(17,945 and 17,946.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 460.

THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL., APPELLANTS,

vs.

THE TERRITORY OF NEW MEXICO.

No. 461.

THE TERRITORY OF NEW MEXICO, APPELLANT,

vs.

THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

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1 Be it remembered that heretofore, on the 4th day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of the record and proceedings in the district court in the case where The United States Trust Company of New York *et al.* were appellants and The Territory of New Mexico was appellee; which said transcript was and is in words and figures as follows, to wit:

2 Be it remembered that heretofore, to wit: on the 16th day of July, 1895, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, sitting for the trial and hearing of causes arising under the Constitution and laws of the United States a bill of complaint; which said bill of complaint is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
against
ATLANTIC AND PACIFIC RAILROAD COMPANY, ATCHISON, Topeka and Santa Fe Railroad Company, St. Louis and San Francisco Railway Company, Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of Atlantic and Pacific Railroad Company; Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of Atchison, Topeka and Santa Fe Railroad Company; Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of St. Louis and San Francisco Railway Company; The Mercantile Trust Company, and The Boston Safe Deposit and Trust Company, Defendants. } In Equity.

3 *Bill of Complaint.*

To the Honorable Needham C. Collier, judge of the district court of the second judicial district of the Territory of New Mexico:

Your orator United States Trust Company of New York, a corporation duly created by and under the laws of the State of New York and a citizen of the said State, having its principal office and place of abode in the city of New York, brings this, its bill, by leave of the court first had and obtained, against Atlantic and Pacific Railroad Company, a corporation created, organized and existing under and by virtue of the laws of the United States of America, and having its principal office and place of abode at Albuquerque, in the

Territory of New Mexico; the Atchison, Topeka and Santa Fe Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and having its principal office and place of abode in and being a citizen and resident of the said State; the St. Louis and San Francisco Railway Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Missouri, and having its principal office and place of abode in and being a citizen and resident of the said State; Aldace F. Walker, as receiver, a citizen of the State of Illinois, and having his place of abode at Chicago, in said State; John J. McCook, as receiver, a citizen of the State of New York, and having his place of abode in the city of New York, in the said State; Joseph C. Wilson, as receiver, a citizen of the State of Kansas, and having his place of abode at Topeka, said State;

4 the Mercantile Trust Company a corporation duly created, organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, having its principal office and place of abode in the city of New York, in said State; and the Boston Safe Deposit and Trust Company, a corporation duly organized and existing under the laws of the State of Massachusetts, and a citizen of said State, having its principal office and place of abode at Boston, in said State, and thereupon your orator complains and says:

First. Your orator is a corporation, bearing the corporate name of United States Trust Company of New York, duly created and existing under the laws of the State of New York, and is a citizen of said State, and has its principal office and place of business in the city of New York, and as such corporation is fully authorized and empowered to hold in trust the property conveyed to it in trust as hereinafter fully stated, and to execute the trusts reposed in it under and by virtue of the mortgage or deed of trust hereinafter described.

Second. That the defendant, Atlantic and Pacific Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the United States of America, to wit, an act of Congress approved July 27, 1866, being a public act to which your orator prays leave to refer as a part of this bill, as fully as though incorporated in the body thereof; and the acts of Congress supplementary thereto and amendatory thereof, including particularly an act approved April 20, 1871, to which your orator prays leave to refer as part of this bill, as fully as though incorporated in the body thereof.

5 Third. That the defendant, Atlantic and Pacific Railroad Company, duly complied with the provisions of said acts of Congress and became and was thereby duly authorized and empowered to and did thereafter construct or acquire by purchase or lease, and operate and maintain the railroads and other property hereinafter mentioned.

Fourth. That in order to secure the bonds to be issued by it, said defendant Atlantic and Pacific Railroad Company, on or about the 1st day of July, 1880, being thereunto by law in all respects duly

authorized, and due corporate action having been had, made, executed and delivered to your orator as trustee a certain mortgage or deed of trust called the Western Division first mortgage of said defendant, bearing date of the 1st day of July, 1880, in and by which it conveyed to your orator as trustee all and singular its railway and property, real, personal and mixed, and all franchises of every kind or description and wheresoever situated, then or thereafter composing or pertaining to that part of the railroad and telegraph line of said defendant known as the Western division, by the following description (the words "party of the first part" referring to said defendant, and the words "party of the second part," referring to your orator), to wit:

"The franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part known as the Western division, beginning at Albuquerque, on the Rio
6 Grande river, in the Territory of New Mexico, and thence running by way of the Agua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by the party of the first part for crossing, and thence by the most practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described; and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges, and appurtenances thereunto belonging, or in anywise appertaining, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the party of the first part of, in and to the same, and any and every part thereof, with the appurtenances."

That since the execution of said Western Division first mortgage said defendant Atlantic and Pacific Railroad Company has acquired a large amount of railroad, engines, cars and other equipment and other personal property, and a large amount of real estate and interests in and rights to real estate, all of which became and are subject to the lien of said mortgage, and the said mortgage is and remains a valid and subsisting lien upon all the property described therein, and upon said subsequently acquired property, and upon all the property, rights and franchises granted to and conferred upon the said Atlantic and Pacific Railroad Company by the
7 acts of Congress hereinbefore mentioned or subsequently acquired thereunder.

Fifth. That being thereunto by law in all respects duly authorized, and due corporate action having been had, and under and in accordance with the provisions of said Western Division first mortgage, said defendant Atlantic and Pacific Railroad Company, on and subsequently to said 1st day of July, 1880, made, executed, and de-

livered its bonds, all bearing date on that day, to an amount not exceeding $25,000 a mile, and amounting in the aggregate to $16,000,000, as follows, viz:

(a.) 15,950 coupon bonds, each for the sum of $1,000, amounting in the aggregate to $15,950,000, in and by each of which bonds the said defendant Atlantic and Pacific Railroad Company promised to pay to your orator, as trustee, or to the bearer thereof on the 1st day of July, 1910, at the agency of the railroad company in the city of New York, the sum of $1,000 in gold coin of the United States of America, and also to pay interest thereon at the rate of six per cent. per annum in like gold coin semi-annually on the first days of January and July in each year, at the agency of said company in the city of New York, on presentation as they severally became due of coupons for such interest annexed to said bonds and payable to bearer.

(b.) Ten registered bonds each for the sum of $5,000, and amounting in the aggregate to $50,000, in and by each of which bonds the said defendant, Atlantic and Pacific Railroad Company promised to pay your orator, as trustee, or to the registered holder thereof, the sum of $5,000 on the 1st day of July, 1910, in gold coin of the
8 United States of America, at the agency of the railroad company in the city of New York, and also to pay interest thereon at the rate of six per cent. per annum in like gold coin semi-annually on the first days of January and July in each year, at the agency of the railroad company in the city of New York.

Sixth. That all of said bonds, amounting in the aggregate to $16,000,000 of principal, were duly issued by said defendant, Atlantic and Pacific Railroad Company, and authenticated by the certificate thereon signed by your orator in accordance with the provisions of said bonds and of said Western Division first mortgage or deed of trust, and were duly negotiated and delivered for value prior to the defaults hereinafter mentioned; and all of said bonds are now outstanding and are valid obligations of said defendant, Atlantic and Pacific Railroad Company. That a true copy of said Western Division first mortgage dated July 1, 1880, in which are set forth true copies of said coupon bonds and of said registered bonds, is hereto annexed marked "Exhibit A," and your orator prays that the same may be taken as part of this bill of complaint as fully as though incorporated in the body thereof.

Seventh. That prior to the making and issue of the said Western Division first-mortgage six per cent. bonds, the defendants, Atchison, Topeka and Santa Fe Railroad Company, and St. Louis and San Francisco Railway Company, acquired the control of the defendant, Atlantic and Pacific Railroad Company, through the purchase and ownership of a majority of its capital stock; that the said bonds were issued and disposed of for the purpose of completing the line of railroad of the Atlantic and Pacific Railroad Company
9 known as its Western division, from Albuquerque, on the Rio Grande river, in the Territory of New Mexico, to The Needles, on the Colorado river, on the boundary of the State of California, in order to form, with the railroads of the said Atchison, Topeka

and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company a through line to the Pacific coast, and that for good and valuable considerations, as additional security for the payment of the principal and interest of the said bonds, the said Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company on the 1st day of July, A. D. 1880, made and executed an agreement whereby they severally covenanted and agreed with the Atlantic and Pacific Railroad Company and your orator, as trustee of said mortgage, that if the earnings from the said Western division should prove insufficient to pay all coupons on said bonds as they matured, they would contribute ratably for the purpose of paying and cancelling the same, such sum as might be necessary for the purpose, from their respective earnings upon all business arising from and delivered to said Western division, not exceeding twenty-five per cent. of the gross amount of their said described earnings. That a copy of said agreement of guaranty is hereto annexed marked "Exhibit B," and your orator prays that the same may be taken as a part of this bill of complaint, with the same effect as if fully incorporated in the body thereof.

Eighth. That on or about the 1st day of October, 1880, the said defendant Atlantic and Pacific Railroad Company made, executed and delivered to the said defendant, The Boston Safe Deposit
10 and Trust Company, as trustee, a certain mortgage, or deed of trust, known as its income mortgage, bearing date on that day, in and by which it agreed with the said trustee to make up and furnish to said trustee from time to time a fair and just account of payments and expenses and gross and net earnings of said Western division for the six months ending on each first day of January and July in each year, so as to exhibit the true sum applicable to the payment of interest on the income bonds referred to in said trust deed, and to pay the said interest or so much thereof as has been earned on the first days of April and October in each year. That the said indenture was made for the purpose of securing the payment of the principal and interest of bonds to be issued under the said indenture to an amount not exceeding $18,750 a mile of completed road, and that, as your orator is informed and believes, such income bonds have been issued thereunder and are now outstanding to an amount in the aggregate of $12,000,000. But your orator charges that the lien and obligation of the said bonds against the defendant Atlantic and Pacific Railroad Company and its property, if any, are inferior and subordinate to the lien and obligation of the bonds secured by the said Western Division first mortgage.

Ninth. That on or about the first day of September, 1887, the said defendant Atlantic and Pacific Railroad Company, made, executed and delivered unto the defendant, The Mercantile Trust Company, its certain second mortgage or deed of trust upon the said Western division, bearing date on that day, in and by which it conveyed to the said Mercantile Trust Company, as trustee, the property in said mort-
11 gage described, being the same property previously conveyed by the said Western Division first mortgage as hereinbefore described. That the said mortgage was made to secure the due

payment of the principal and interest of bonds known as second-mortgage six per cent. guaranteed gold bonds of the Atlantic and Pacific Railroad Company, Western division, limited to $10,000 a mile of completed railroad of the Western division of said railroad company, to be guaranteed severally, but not jointly, as to the payment of one-half of the principal and interest by the Atchison, Topeka and Santa Fe Railroad Company and as to the payment of one-half of the principal and interest by the St. Louis and San Francisco Railway Company, which said last-named two companies joined in the execution of the mortgage above set forth as guarantors of the payment of said principal and interest; which said bonds were each for the sum of $1,000, payable on the 1st day of September, 1907, and to bear interest at the rate of six per cent. per annum, payable semi-annually on the first days of March and September in each year, at the agency of said railroad company in the city of New York.

That of the bonds authorized to be issued under and to be secured by said mortgage or deed of trust, the defendant Atlantic and Pacific Railroad Company has made and issued, as your orator is informed and believes, second-mortgage six per cent. guaranteed gold bonds for the principal sum of $5,600,000, of which, $5,500,000 are now actually outstanding, and all, or the greater part of which, were taken by the defendants Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway
12 Company as security for, or in payment of, debts claimed to be due to them from the Atlantic and Pacific Railroad Company, and such bonds are now held by them. That the lien and claim of the said second-mortgage six per cent. guaranteed gold bonds upon the railroad and property of the defendant Atlantic and Pacific Railroad Company, if any, are expressly subject, subordinate and inferior to the lien of the Western Division first mortgage hereinbefore referred to.

Tenth. That on each of the first days of January and July, 1894, and January and July, 1895, the holders of said Western Division first-mortgage six per cent. bonds to the amount of $16,000,000, were entitled to collect and receive from said defendant Atlantic and Pacific Railroad Company, the interest falling due on said bonds on each of said first days of January and July in each of said years respectively, being the semi-annual installments of interest due on each of said bonds on said dates; but the said defendant Atlantic and Pacific Railroad Company made default in the payment of said interest; and said semi-annual installments of interest falling due on the said dates respectively, together with certain interest previously due on said bonds, remain wholly due and unpaid.

Eleventh. That on or about the 30th day of December, 1893, the defendant, The Mercantile Trust Company, filed in this court its bill of complaint against the said defendant Atlantic and Pacific Railroad Company, and therein set forth, among other things, that the said complainant was the trustee under the second mortgage upon the Western division of said company hereinbefore mentioned;

that in and by said mortgage the said defendant Atlantic
13 and Pacific Railroad Company agreed, among other things, promptly to pay all taxes and assessments upon the premises conveyed thereby, but that the said company had wholly failed to keep and perform its said covenants, and that there were then due large amounts of unpaid taxes in the Territories of Arizona and New Mexico; that the said complainant had duly demanded that the said railroad company should keep and perform its said covenants, but that the said railroad company had wholly failed and refused to comply with such demand; and the said complainant in said cause further showed that the defendant Atlantic and Pacific Railroad Company was wholly and totally insolvent and unable to meet its existing and presently accruing obligations, and that the interests of the holders of the second-mortgage bonds secured by said mortgage were seriously imperiled thereby, and unless accorded judicial protection would be wholly lost, to the great detriment and damage of said bondholders.

That upon the filing of said bill such proceedings were thereupon had, that on January 4, A. D. 1894, the Honorable Needham C. Collier, a judge of this court, made an order appointing Joseph W. Rheinhart, John J. McCook, and Joseph C. Wilson, receivers, as in said bill prayed, of all and singular the lands, tenements and hereditaments of the defendant Atlantic and Pacific Railroad Company covered by the said second mortgage, which order was duly filed in said cause on said 4th day of January, 1894. That, as your orator is informed and believes, the said Joseph W. Reinhart, John J. McCook and Joseph C. Wilson filed their bonds and qualified as such receivers and entered into possession of all the real estate
14 and property of the Western division of said defendant railroad company and continued in such possession until the 23rd day of August, 1894, on which date the said Joseph W. Reinhart resigned as such receiver, and by an order made and entered in said cause on or about that day, Aldace F. Walker was appointed receiver in his place and duly filed his bond and qualified as such receiver and entered into possession of the said railroad and property as co-receiver with said John J. McCook and Joseph C. Wilson; and from and after said date said Aldace F. Walker, John J. McCook and Joseph C. Wilson, as such receivers, have had and now have the actual possession, custody and control of all the property known as the Western division of the said railroad company covered by the said second mortgage and being the same property covered by and included in the said Western Division first mortgage to your orator as aforesaid; and, by reason of the fact that this court has, by the appointment of such receivers, taken into its custody and possession all of said mortgaged property situated within the jurisdiction of this court, your orator believes that it cannot proceed to adequately enforce the security provided in and by the said mortgage in any other court, and your orator is without remedy save in this court. That by an amended and supplemental bill of complaint, heretofore filed in said cause, your orator has been made a party defendant thereto for the sole avowed purpose of ascertaining the amount

due on said first-mortgage bonds. Your orator prays leave to refer to the said bill of complaint of The Mercantile Trust Company, and to the order appointing said receivers, and to all other acts and proceedings in said cause on file in this court, as part of
15 this, your orator's bill of complaint, with the same effect as if fully incorporated in the body thereof.

Twelfth. And your orator further shows that the defendants Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company have wholly made default in the fulfillment of their agreement hereinbefore mentioned to contribute to the extent of twenty-five per cent. of their earnings from business interchanged with the Atlantic and Pacific Railroad Company toward the payment of the interest upon the said first-mortgage bonds, and that the receivers of property and franchises of said two companies, who were also appointed receivers of the railroads and property of the defendant Atlantic and Pacific Railroad Company, have likewise wholly failed to fulfill and carry out the said agreement.

That there are important and nice questions in dispute between said three railroad companies and their respective receivers growing out of various contracts for the operation of said Atlantic and Pacific railroad and the payment of its bonded and guaranteed debt, and that, as your orator is advised and believes, it is not practicable for the receivers of said Atchison, Topeka and Santa Fe railroad and said St. Louis and San Francisco railway to adequately assert and protect the interests of said Atlantic and Pacific first-mortgage bondholders.

Thirteenth. And your orator further shows that the said defendant Atlantic and Pacific Railroad Company is hopelessly insolvent and unable to pay its indebtedness now outstanding to a large amount, including the overdue interest upon its first-mortgage
16 bonds hereinbefore mentioned, and that the said defendant railroad company cannot secure the means of paying the said overdue obligations; and that it is necessary for the protection of the holders of said bonds issued under said Western Division first mortgage, that the property of said railroad company should be sold without delay. That the property and premises covered by the said first mortgage so made to your orator as aforesaid, are and constitute very inadequate security for the payment of the amounts due on the said bonds, and that the said mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels with out great injury to the interests of the beneficiaries under your orator's trust, and all persons interested in the property of said defendant railroad company.

Fourteenth. That default has been made in the payment of interest upon all of said first-mortgage bonds and such default has continued during more than six consecutive months; that the holders of the entire amount of the bonds secured by the said first mortgage, have joined in a demand requiring your orator, as trustee under said mortgage or deed of trust, to file this bill and have concurred in the application for a decree for the foreclosure of said

mortgage and the sale of the mortgaged premises, and for the appointment in the meantime of a receiver thereof; that the holders of all of said bonds have likewise united in a declaration electing that the principal of the said bonds shall be considered due, and that by reason of the facts hereinbefore alleged, the whole amount of the principal of said bonds, as well as all interest due
17 thereon, as hereinbefore mentioned, is now due and payable, and that your orator is entitled to apply to this court for the foreclosure and sale of the premises covered by the said first mortgage, and for the appointment in the meantime of a receiver of said mortgaged premises in the interest of said first-mortgage bondholders.

Fifteenth. That no proceedings have been had at law or in equity for the collection of said mortgage debt or any part thereof.

In consequence of the embarrassed condition of the financial affairs of the defendant railroad company and on account of the many difficulties which are manifestly, from the allegations hereinbefore contained, involved in the execution of your orator's said trust, it is impossible for your orator, as trustee under said first mortgage, to execute its said trust in the way and manner specified and provided in and by the said mortgage without the aid or interposition of this honorable court, in chancery sitting, nor can the said trust be executed, as your orator is advised and charges, and the rights of your orator be fully protected in the premises otherwise than by judicial sale of the mortgaged premises and of all the franchises, property, premises and appurtenances of said defendant railroad company; and your orator is likewise advised and charges that until such sale can be had and the proceeds thereof distributed, it is expedient and necessary that the franchises, property, premises and appurtenances so mortgaged to your orator in trust as aforesaid, and all the rights, franchises and property of said railroad company of whatever name, nature or description covered by said mortgage, including all its moneys on hand and the
18 earnings of the same, be placed in and continue in the hands and under the control of a receiver appointed herein by this court, with such proper powers and control over the same as to the court shall seem right and equitable to be conferred.

Sixteenth. That this suit is one arising under the Constitution and laws of the United States, and that the matter in controversy herein is upwards of five thousand dollars exclusive of costs.

In consideration whereof, and forasmuch as your orator is remediless in the premises by the rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and that they may separately and severally answer make (but not under oath, their answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, to all the matters and charges aforesaid, and as fully in every respect as if the same were here again repeated, and they thereunto particularly interrogated, your orator prays:

First. That a receiver may be appointed in this cause of all and singular the rights, franchises, and property of every name and nature of said defendant Atlantic and Pacific Railroad Company, with power and authority to operate said railroads and to preserve the property of said defendant, and to carry on the business of said railroad company, under the direction of this court, with all the usual powers and duties of receivers in such cases, and with authority to proceed to recover, by suit or otherwise, all property in
19 the hands of other parties belonging to the said railroad company, and all moneys justly due to it and unlawfully withheld by any person on any pretense whatever, and that an injunction may issue out of this court restraining and enjoining the said railroad company and all and every its agents and servants from, in any way, interfering with the possession or control of the property of said railroad company under the control of said receiver, and from selling, transferring, conveying, leasing or otherwise disposing of or encumbering any of the property, rights or franchises of the said railroad company.

Second. That the said Western Division first mortgage, dated July 1, A. D. 1880, may be decreed to be a first lien upon all the property, real, personal, and mixed, rights and franchises described in the said mortgage, and then owned or subsequently acquired by said defendant, Atlantic and Pacific Railroad Company, to secure the payment of said bonds issued thereunder, and the interest and coupons for interest on the said bonds outstanding and unpaid, and the interest thereon, and that an account be taken of the bonds secured by said first mortgage and of the amount due and unpaid on the said bonds and the coupons thereon.

Third. That said defendant, Atlantic and Pacific Railroad Company, may be decreed to pay all moneys now due or to become due and payable under and by virtue of said first mortgage, and the bonds issued thereunder and secured thereby, and of the coupons for interest thereon, and that in default thereof said Atlantic and Pacific Railroad Company and all persons claiming under, by or through it, or claiming any interest in said mortgaged premises and property or any part thereof, may be forever barred and fore-
20 closed of and from all equity of redemption and claim of, in and to the said mortgaged premises and every part and parcel thereof and that all the property of said defendant railroad company, real, personal and mixed, and all the effects, rights, immunities and franchises belonging to it or covered by said mortgage may be sold under the direction of this honorable court in such manner as the court may direct and according to the law and practice of this court, to satisfy the amount found due, and that out of the proceeds of such sale, or the net earnings while in the hands of the said receiver, there may be paid first, the costs and expenses of your orator in this suit, including attorneys', solicitors' and counsel fees, with a proper compensation to your orator for its own service as trustee, to be allowed by the court, and that the residue thereof may be applied in such proportions and when and as the court shall order and direct, and in due order of priority, to the payment of the

said bonds issued under said first mortgage and the coupons for interest thereon, together with interest on said bonds and coupons, and that any deficiency on such sale may be entered in this cause as a judgment against said defendant railway company.

Fourth. That your orator may have such other and further relief in the premises as the circumstances of the case may require and may be agreeable to equity.

May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this honorable court, directed to the defendants Atlantic and Pacific Railroad Com-
21 pany, Atchison, Topeka and Santa Fe Railroad Company, St. Louis and San Francisco Railway Company, Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of the Atlantic and Pacific Railroad Company; Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of the Atchison, Topeka and Santa Fe Railroad Company; Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of St. Louis and San Francisco Railway Company; The Mercantile Trust Company and The Boston Safe Deposit and Trust Company to appear and answer this bill.

And your orator will ever pray, &c.

UNITED STATES TRUST COMPANY
OF NEW YORK,

[SEAL.] By JOHN A. STEWART, *President.*

Attest: H. L. THORNELL, *Secretary.*

EDWARD W. SHELDON,
Complainant's Solicitor.

FREDERICK B. JENNINGS, *Of Counsel.*

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Stewart, being duly sworn, depose and say that I am president of The United States Trust Company of New York, the complainant above named, and have been such president for a number of years past; that I have read the foregoing bill of complaint and know the contents thereof, and that the same is true to the best of my knowledge, information and belief; that this verifi-
22 cation is not made by the complainant because it is a corporation; that my knowledge or information are derived from having taken part in some of the transactions spoken of, from statements, made to me, and from examination of the papers, and the same constitute my grounds of belief, and that the seal affixed to said bill of complaint is the corporate seal of said complainant and was so affixed by its authority.

JOHN A. STEWART.

Sworn to before me this 10th day of July, 1895.

HENRY C. KENNEDY,
Notary Public, Kings Co.

[SEAL.]

Cert. filed N. Y. Co.

EXHIBIT A.

This indenture, made this first day of July, in the year of our Lord one thousand eight hundred and eighty, by and between the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the United States Trust Company of New York, a corporation duly organized and existing under the laws of the State of New York, party of the second part, witnesseth:

That whereas the party of the first part, under the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27, 1866, is authorized to construct, is now constructing, and has partially constructed, and intends to complete, equip and put in operation as rapidly as practicable, that part of said company's authorized line of railroad and telegraph lying between the Rio Grande river and the
23 Pacific ocean, and hereinafter described and referred to as the "Western division;"

And whereas, the party of the first part has duly executed an agreement under seal, dated January 31, 1880, wherein, among other things, it agreed with the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to complete said Western division as rapidly as practicable, and that the railroad of the St. Louis and San Francisco Railway Company and the railroad of the Atchison, Topeka and Santa Fe Railroad Company and the Western division of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be operated by the respective companies as an uninterrupted, continuous through line of railroad to and from the Mississippi and Missouri rivers and the Pacific coast for and during the term of thirty (30) years from the first day of July in the present year, and afterwards until the first day of October, A. D. 1910; and in consideration thereof said Atchison, Topeka and Santa Fe Railroad Company and said St. Louis and San Francisco Railway Company have executed the contract of guaranty indorsed thereon;

And whereas, said act of Congress provides as follows:

"SECTION 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, muni-
24 tions of war and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any State, and whenever,

on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate and associate with said company upon the terms named in the first and
25 seventeenth sections of this act: Provided, further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided, further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: And provided, further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific railroad.

"SECTION 4. And be it further enacted, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report, under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed,
26 completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

And whereas, by an act of Congress, entitled "An act to enable the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20, 1871, it was enacted as follows, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

"That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27, 1866, is hereby authorized to make and issue its bonds, in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior; provided that, if the company shall hereafter suffer any breach of the conditions of the act above referred to under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said
27 road which shall have been constructed at the time of the foreclosure of said mortgage."

And, whereas, the party of the first part, for the purpose of obtaining means to complete the construction and equipment of the "Western division," has resolved to issue and negotiate its first-mortgage bonds to an amount not exceeding twenty-five thousand dollars a mile, to consist of a series of coupon bonds of one thousand dollars each, numbered consecutively from number 1 (one) upwards, and registered bonds of five thousand dollars each, numbered consecutively from number 1 (one) upwards, which bonds bear even date herewith; and said coupon bonds are all of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $1,000.

Atlantic and Pacific Railroad Company,
Western Division.

First-mortgage Coupon Six per Cent. Gold Bond.

Know all men by these presents that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the United States Trust Company of New York, trustee, or bearer, one thousand dollars, on the first day of July, A. D. 1910, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, together with interest thereon at the rate of six per cent. per annum in like gold coin payable semi-annually on the first days of January and July, according to the tenor of the coupons hereto annexed, and upon presentation thereof as they severally fall

due; both principal and interest will be paid at the agency of the railroad company in the city of New York.

28 It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor; and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a first mortgage of even date herewith, to the United States Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Western division, as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely:

First. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

Second. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

Third. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

29 Fourth. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment for any or all lands sold by the Atlantic and Pacific Railroad Company under the provisions of said mortgage; and this bond is entitled to the benefit of such provisions.

This bond shall pass by delivery or by transfer upon the books of the Atlantic and Pacific Railroad Company at the option of the holder; and, after a registration of ownership certified hereon by the treasurer or transfer agent of said company, no transfer except upon the books of said company shall be valid, unless the last transfer was made to bearer, thereby restoring transferability by delivery.

This bond is not valid unless authenticated by a certificate indorsed hereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these presents

[SEAL.] to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

And said registered bonds are of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $5,000.

30 Atlantic and Pacific Railroad Company, Western Division.

First-mortgage Registered Six per Cent. Gold Bond.

Know all men by these presents that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the United States Trust Company of New York, trustee, or the registered holder hereof, the sum of five thousand dollars, on the first day of July, A. D. 1910, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, with interest thereon at the rate of six per cent. per annum in like gold coin, payable semi-annually on the first days of January and July; both principal and interest payable at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for payment thereof to the individual liability, if any, of any stockholder of the company.

This bond is transferable only upon the books of the railroad company, and is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected and payment thereof equally secured by a first mortgage of even date herewith, to the United States Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its
31 successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Western division as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely:

First. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

Second. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

Third. For the payment of the principal and interest of any ad-

vances made by the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to the Atlantic and Pacific Railroad Company under their contract endorsed upon this mortgage.

Fourth. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment of any or all lands sold by the Atlantic and Pacific Railroad Company under the provisions of said mortgage. And this bond is entitled to the benefit of such provisions.

This bond is not valid unless authenticated by a certificate endorsed hereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

32 In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, [SEAL.] and these presents to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

And whereas, the following certificate is to be endorsed upon each of said coupon and registered bonds, namely:

The within bond is one of a series issued by the Atlantic and Pacific Railroad Company, and described in a first mortgage of even date herewith, executed by said railroad company to the United States Trust Company of New York, as trustee, upon the franchises, railroad, telegraph, lands, land grants, and other property pertaining to the Western division of said railroad company, as set forth in said mortgage; and this bond is entitled to the benefit of the agreement of the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, endorsed upon said mortgage.

——, *Trustee.*

And whereas, the party of the first part, being about to issue some of said bonds and intending to issue the remainder from time to time as it may deem expedient, for the purposes aforesaid, desires to secure the principal and interest of all the said bonds by a mortgage of the franchises and properties hereinafter described to the party of the second part, as trustee, for the equal benefit of all the persons and corporations who may become the holders of any of

33 said bonds, without any preference by reason of priority of issue, or any other cause or thing whatsoever, and the party of the second part has signified its willingness to accept said trust:

Now, therefore, the party of the first part, in consideration of the premises, and of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and in

order to secure the payment of the principal and interest of all said first-mortgage bonds, both coupon and registered, according to the tenor thereof, does, by these presents grant, bargain, sell, transfer, assign and convey to the party of the second part, trustee as hereinafter set forth, its successor or successors in said trust, and assigns forever, the franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part known as the Western division, beginning at Albuquerque on the Rio Grande river, in the Territory of New Mexico and thence running by way of Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such a point as may be selected by the party of the first part for crossing, and thence by the most practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described; and also all additions and extensions which the party of the first part
34 may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and in equity, of the party of the first part, of, in and to the same, and any and every part thereof, with appurtenances:

To have and to hold the same to the party of the second part, trustee as aforesaid, its successor or successors in said trust, and their assigns, in trust for the benefit and security of any and all persons and corporations who shall be or become holders of any of said first-mortgage bonds, without preference by reason of priority of issue, or of any cause or thing whatsoever, upon the trusts, conditions, and agreements, and to and for the uses and purposes hereinafter expressed, namely:

Article 1. The party of the first part hereby agrees to pay all taxes and assessments upon the granted premises, and not to suffer any lien or attachment superior to the lien created by these presents to be enforced thereon, and not to commit or suffer any waste thereof.

Article 2. The proceeds of said first-mortgage bonds from time to time issued and negotiated shall be deposited, one-half with the United States Trust Company of New York, and one-half with the Boston Safe Deposit and Trust Company of Boston, or, in whole or in part, with such other trust companies as the directors of the party of the first part may designate, and the party of the second part, its successor or successors in said trust, approved, to the credit
35 of the party of the first part, and shall be used for the purpose of constructing, equipping, maintaining and operating said Western division of the Atlantic and Pacific Railroad Company and for the payment of the interest maturing on such bonds until the completion of said division to the Pacific coast, or until

such party of the second part shall, by a contract with any other road, form a through line, properly equipped to the Pacific coast, and for one year thereafter. The party of the first part agrees to complete said Western division or form such through line, as aforesaid, with due and reasonable diligence; to furnish to the party of the second part during construction, monthly accounts, showing the application of said proceeds, and to permit, at any and all reasonable times, an inspection of its books and vouchers by the party of the second part, its agents or attorneys.

But the party of the second part and the holder of said bonds shall not be obliged to make any inquiry in respect to, or be in any manner answerable for, the application or misapplication of said proceeds.

Article 3. The party of the first part shall, at its discretion from time to time sell the lands received from the United States under said first-named act of Congress, and any and all acts subsequent thereto, to aid in the construction of said railroad and telegraph, and included in this mortgage, at just and reasonable prices, either wholly for cash or partly upon credit, secured by a lien upon the land sold, and the party of the second part, its successor or successors in said trust, shall upon demand from time to time release the lands thus sold to the party of the first part, or to
36 the purchaser thereof, as may be deemed most advisable; provided, however, that the appointment of the land commissioner shall be made by the party of the first part with the approval of the party of the second part, which approval shall be inferred if no objection is made within thirty days after notice of the intended appointment; that the party of the first part may remove said commissioner at any time, and shall remove him upon request of the party of the second part for cause shown; that said commissioner shall certify, upon request of the party of the second part, that the prices at which any and all said lands are sold from time to time are just and reasonable, and such certificate shall, for the protection of the party of the second part, be sufficient evidence of the facts therein stated. And provided also that the net cash proceeds of said lands shall be deposited with, and all notes and securities taken therefor shall be held subject to the control of the United States Trust Company of New York, trustee, or its successor or successors in said trust, and used solely—

First. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds; and

Second. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

Third. For the payment of the principal and interest of any advances, made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

37 Fourth. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

Provided, however, that the bonds hereby secured may be received at par and accrued interest in payment for any and all of said lands, and when so received shall be forthwith cancelled. And the party of the second part shall also release upon demand, from time to time, to the party of the first part, its successors or assigns, other lands, buildings or property of any kind included in this mortgage which may be sold or exchanged without impairing the efficiency of the said railroad and telegraph; provided, however, that in case of sale the net proceeds thereof, be paid to the party of the second part, its successor or successors in said trust, and applied as above, or used by the party of the first part to replace the property sold, and that the party of the first part shall, upon demand, from time to time, execute such deeds or mortgages as may be necessary to extend the lien created by these presents to the new property thus acquired by purchase or exchange.

Article 4. Until default, as hereinafter described, in the principal or interest of said first-mortgage bonds, or of any of the agreements and conditions herein declared to be kept and performed by the party of the first part, said party shall possess, operate, maintain and enjoy the railroad and telegraph composing said Western division, and all the franchises, rights and property of every kind with the appurtenances included in this mortgage, and collect, receive and use the rents, tolls, issues, income and profits thereof.

38 Article 5. If there shall be any default in the payment of the interest of the bonds hereby secured, or in any of the agreements or conditions to be kept and performed by the party of the first part, and such default continues during six consecutive months, or if there shall be any default in the payment of the principal of said bonds, then and at any time thereafter during the continuance of such default, and for the purpose of foreclosing this mortgage, the party of the second part, its successor or successors in said trust, may personally or by its, his or their attorney or agent, enter upon, take, possess, maintain and operate said railroad and telegraph and all franchises, property and appurtenances of every description belonging or pertaining to said Western division, and make any necessary alterations in and additions thereto, and collect and receive the rents, tolls, issues, income and profits thereof, and shall sell and dispose of said lands and land grants; and, after paying all taxes, assessments and liens superior to the lien created by these presents, and all proper expenses of construction, operating and maintaining said railroad and telegraph and of selling and disposing of said lands and land grants, including the compensation of said trustee, shall apply the remainder as follows, namely:

First. To the payment of interest on said first-mortgage bonds.

Second. To the payment of the principal of said bonds, if the same is then due, or if the holders of one-third in amount of said bonds outstanding shall elect that the same shall then be considered due; but, in case said principal is due, or elected to be con-

39 sidered due the said remainder shall be applied to payment of interest and principal without preference.

Third. If said principal is not due or elected to be considered due

as aforesaid, then the net proceeds of the land grant shall be applied as provided in article 3, and the net proceeds of the railroad and telegraph, after payment of interest on all bonds in the order of preference, and of all other interest-bearing indebtedness pertaining to said Western division, shall be applied to a sinking fund for the purchase and cancellation of the said first-mortgage bonds at not exceeding par and accrued interest, and for the ultimate payment of said last-named bonds. And, if the earnings of said railroad and telegraph, after payment of expenses of operating and maintaining the same, and all proper charges, are sufficient to pay the interest on the bonds hereby secured, as the same falls due, and all arrearages of interest on said bonds have been fully paid, the trustee or trustees having said possession as aforesaid, shall surrender and restore the railroad and telegraph with all the rights, franchises and property of every kind pertaining to said Western division, and all additions thereto and extensions thereof, and, reserving all funds which should be retained and applied under article 3, shall deliver up all moneys, bills, accounts, claims and demands of every name and nature pertaining to said Western division, and all branches thereof, to the party of the first part, its successors or assigns, who shall possess and enjoy the same, subject, however, to the provisions of this mortgage; provided, however that any default may
40 be waived by the written assent thereto of a majority in interest of the bonds outstanding; but waiver of any previous default shall not affect the rights of the parties upon any default subsequently happening. And the provisions of both articles 5 and 6 are subject to this proviso.

Article 6. If there shall be any such default as described in article 5, and the same is not waived as provided in the same article, then, and at any time thereafter during the continuance of such default, the party of the second part, its successor or successors in said trust, may, and upon demand of the holders of one-fourth in amount of said first-mortgage bonds outstanding, with indemnity for expenses liable to be incurred, shall, with or without entry, sell the said franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies, and all property of every description then composing and pertaining to said Western division, at public auction, free and discharged from all said trusts, first publishing notice of the time and place of said sale in one or more daily newspapers in each of the cities of Boston, New York, St. Louis, Chicago, and San Francisco, not less than three times a week for six consecutive weeks next preceeding the time appointed, and shall execute and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds in the law for the same in fee-simple; which sale and conveyance made as aforesaid, shall be a perpetual bar at law and in equity to the party of the first part, and all persons claiming through, by or under the said party. The party of the second part, its successor or successors in said trust, may pur-
41 chase at said sale; and no other purchaser shall be liable for the application or misapplication of the purchase-money, or

be under any obligation to inquire into the necessity, expediency or authority for any such sale. And the net proceeds of such sale, after deducting all proper charges and expenses, shall be applied without preference to the payment of the principal and interest of the first-mortgage bonds hereby secured; and any surplus then remaining shall be paid to the party of the first part, its successors or assigns, or to such person or corporation as may be lawfully entitled to receive the same.

Article 7. If the party of the first part shall pay the principal and interest of all the first-mortgage bonds secured hereby which may be issued, according to the tenor thereof, this mortgage and all of said bonds shall be void, but otherwise of full effect and virtue.

Article 8. The party of the first part, its successors and assigns, shall, from time to time, and at all times hereafter, and as often as thereunto requested by the party of the second part, its successor or successors in said trust, execute, acknowledge and deliver all such further deeds, conveyances and assurances in the law for the better assuring unto said trustee, and its successor or successors in the trust hereby created, upon the trusts herein expressed, the lands, land grants, railroad, telegraph equipments and appurtenances hereinbefore mentioned or intended so to be, now and hereafter composing or pertaining to said Western division, and all additions thereto and extensions thereof, as by the said trustee, its successor or successors in said trust, or by its, his or their counsel learned in the law,
42 shall be reasonably advised or required.

Article 9. The present or any future trustee may resign upon three months' notice in writing to the party of the first part, its successors or assigns, and to the holders of record of the bonds hereby secured, and may be removed at any time by a vote of a majority in interest of the holders of all said bonds outstanding at a meeting of the bondholders, attested by a written statement of such vote signed by the persons so voting, and may be removed at any time by the party of the first part, its successors or assigns, with the written assent of the holders of one-fourth in amount of all said bonds outstanding; and any vacancy in the trusteeship hereby created, occasioned by the dissolution, death, resignation, removal, incapacity or refusal to act of the present or any succeeding trustee, may be filled by appointment made by the party of the first part, its successors or assigns, with the approval of the majority in interest of the bondholders present or represented by proxy at a meeting held for that purpose, and such action may be had in anticipation of and before the actual happening of a vacancy. And, if the vacancy is not filled as aforesaid before the expiration of thirty days after the same has occurred, any justice of the Supreme Court of the United States may, upon application of the party of the first part, its successors or assigns, or of any holder or holders of the first-mortgage bonds hereby secured, to the amount at par of one million dollars, or a less amount, if so many are not outstanding, appoint one or more persons or corporations to fill said vacancy.

And the act of appointment made in any of the ways afore-
43 said, and the acceptance on the part of the appointee, shall vest in such appointee all the estates, rights, titles, properties, interests and powers before vested in his or its predecessor under this mortgage, and upon the trusts, agreements and conditions, and to and for the uses and purposes therein declared. Nevertheless, the present and any and all future trustees hereunder, by the acceptance of said trust, severally covenant and agree for themselves, their successors and administrators respectively, that they will execute, acknowledge and deliver, each to his or its respective successor or successors in said trust, from time to time, and at all times as often as requested thereunto by the party of the first part, its successors and assigns, or by the holders of said bonds to the amount of one million dollars, or a less amount if so many are not outstanding, such deeds, conveyances and assurances in the law for the better assuring to such successor or successors the said estates, rights, titles, properties, interests and powers as counsel learned in the law may reasonably advise or require. Meetings of the bondholders may be called by either of the parties hereto, or by holders of said bonds amounting at par to one million dollars, or a less amount if so many are not outstanding, or by any committee chosen at a previous meeting, by publishing notice of the time and place of meeting in one or more newspapers in the cities of Boston, New York, St. Louis and San Francisco, twice each week for six successive weeks prior to the time of said meeting. And, in all meetings of bondholders, holders of record, and persons exhibiting proof satisfactory to said meeting that they are *bona fide* holders of said bonds, shall be entitled in person, or by attorney, to vote in
44 proportion to the amounts held by them.

Article 10. The present trustee, its successor or successors in said trust, may, in case of necessity, employ agents, attorneys or servants in the discharge of said trust, and the just and reasonable charges of said trustee and its agents, attorneys and servants shall be paid by the party of the first part. The present trustee, its successor and successors in said trust, shall not be liable for any error of judgment or mistake of fact made by it or any of them in good faith, and shall not be liable for any error of judgment or mistake of fact, or for any act or thing whatsoever done, suffered or neglected by its or their agents, attorneys, servants or employés selected in good faith in the discharge of said trusts. And, if at any time there shall be two or more trustees joined in the said trusts, neither shall be in any manner answerable for the acts of the other.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and
[SEAL.] these presents to be signed by its president and attested by its secretary; and the United States Trust Company of New York, in token of its acceptance of the foregoing trusts, has caused its corporate seal to be affixed hereto, and these presents to

be signed by its president, and attested by its secretary, the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD COMPANY,
By THOMAS NICKERSON, *President.*

Attest: S. W. REYNOLDS, *Secretary.*

UNITED STATES TRUST COMPANY OF NEW YORK.
[SEAL.] By JOHN A. STEWART, *President.*

45 Attest: J. S. CLARK, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } ss:

On this third day of August, A. D. 1880, before me Levi C. Wade, a notary public in and for said county of Suffolk, personally appeared Thomas Nickerson and S. W. Reynolds, known to me to be, respectively, in the order named, president and secretary of the above-named Atlantic and Pacific Railroad Company, and made oath that they are respectively such president and secretary; that, by order of the board of directors of said company, they signed, attested and sealed with said company's seal the foregoing instrument as above appears, and acknowledged the same to be the free act and deed of said company.

[NOTARIAL SEAL.] LEVI C. WADE.

STATE OF NEW YORK, *City and County of New York,* } ss:

On this ninth day of August, A. D. 1880, before me came John A. Stewart, with whom I am personally acquainted, who, being by me duly sworn, says that he resides in said city; that he is the president of the United States Trust Company of New York; that he knows the corporate seal of said corporation, and that the seal which is affixed to the foregoing instrument is the corporate seal of the said corporation, and was affixed thereto by authority of the board of trustees of said corporation; and that he signed the same as president of said corporation by the like authority.

[NOTARIAL SEAL.] HENRY L. THORNELL,
Notary Public, New York Co.

EXHIBIT B.

46 Whereas, the St. Louis and San Francisco Railway Company, the Atlantic and Pacific Railroad Company, and the Atchison, Topeka and Santa Fe Railroad Company duly executed an agreement under seal, dated January 31, 1880, wherein among other things, they agreed that the railroad of the St. Louis and San Francisco Railway Company, and the railroad of the Atchison, Topeka and Santa Fe Railroad Company, and the Western division

of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be operated by the respective companies as an uninterrupted, continuous through line of railroad to and from the Mississippi and Missouri rivers and the Pacific coast, for and during July in the present year and afterwards until the first day of October, A. D. 1910:

Now, therefore, in consideration of said agreement, and of one dollar to us in hand paid, the receipt of which is hereby acknowledged, the St. Louis and San Francisco Railway Company, and the Atchison, Topeka and Santa Fe Railroad Company, do severally covenant and agree with the Atlantic and Pacific Railroad Company and the United States Trust Company of New York, trustee in the within mortgage for the benefit of the holder of the first-mortgage bonds secured thereby, that, if at any time after twelve months following the completion of the Western division of the said company in the within mortgage mentioned, or after twelve months after the Atlantic and Pacific Railroad Company shall, by a contract with any other road, have formed a through line to the Pacific coast, its earnings should prove insufficient to pay all coupons on said bonds as they mature, they will
47 contribute, ratably, to the earnings, hereinafter described, for the purpose of paying and cancelling the same from their respective earnings upon all business received from and delivered to said Western division, by and from their lines of road as above set forth, such sum as may be necessary to make up the deficiency of the earnings of the said Atlantic and Pacific Railroad Company, and the amount required to pay such coupons, but not exceeding twenty-five per cent. (25 per cent.) of the gross amount of their said described earnings respectively during the six months, ending on the first days of October and April, preceding the due date of such coupons.

In witness whereof, the said St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company have severally caused their corporate seals to be at-
[SEAL.] tached hereto, and these presents to be signed by their respective presidents and attested by the secretary of the first-named and the assistant secretary of the last-named company, on this first day of July, A. D. 1880.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY,
[SEAL.] By E. F. WINSLOW, *President.*

Attest: C. LITTLEFIELD, *Secretary.*

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY,
[SEAL.] By T. JEFFERSON COOLIDGE, *President.*

Attest: GEO. L. GOODWIN,
Assistant Secretary.

48 And thereafter and on, to wit: the 10th day of January, 1896, there was an order duly made and entered of record in the said cause appointing a receiver of the property and franchises of the Atlantic and Pacific Railroad Company, which said order is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY ET AL., Defendants.
} No. 1122.

Order Appointing Receiver.

Now on this 10th day of January, A. D. 1896, comes the complainant, The United States Trust Company of New York, by Neill B. Field, one of its solicitors; and also come the defendants, except the defendant, The Boston Safe Deposit and Trust Company, by their respective solicitors, and thereupon, upon the record in this cause, comes on for hearing the application of the United States Trust Company of New York for the appointment of a receiver herein, which application is consented to by the defendants, The Atlantic and Pacific Railroad Company, The Atchison, Topeka and Santa Fe Railroad Company, The St. Louis and San Francisco Railway Company, and the receivers of the property and franchises of said three last-named corporations, The Mercantile Trust Company, defendant herein, not consenting, and the same having been

49 heard by the court, and the court being now fully advised in the premises—

It is now hereby ordered, adjudged and decreed, that Charles W. Smith be and he hereby is appointed receiver of all and singular the lands, tenements and hereditaments of the said Atlantic and Pacific Railroad Company covered by the mortgage sought to be foreclosed herein, and also all personal estate thereof, including all its railroad tracks, rights of way, sidings, structures, depot grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering places, workshops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with its leases, rights under lease, rents from hired lands or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks and other rolling stock, its machinery, tools, scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description; and all its stocks, bonds and obligations, choses in action, accounts and rights under contracts now owned or possessed by the said defendant railroad company, covered by the mortgage sought to be

foreclosed herein, together with the corporate rights, immunities and franchises and all of the tolls, fares, freights, rents, income and profits covered by said mortgage; and that the said receiver be and he is hereby authorized and directed to take possession of all and singular the railroads and properties above described, or above referred to, wherever situated or found, and to continue the operation of the said railroad, and every part or portion thereof, and to run, manage and operate the said railroad and every part or portion thereof,
50 and such other railroads as the said defendant railroad company owns or holds, controls or operates under lease, contract, arrangement or otherwise, as heretofore run and operated or which have been, or are being operated by, for or in the interest of the said Atlantic and Pacific Railroad Company, and to conduct the business and occupation of a common carrier of passengers and freight; and to discharge all public and Governmental duties obligatory upon said corporation or upon any other corporation whose lines of road are now in the possession of or operated by the said Atlantic and Pacific Railroad Company, and to preserve the said property in proper condition, and repair the same so that it may be safely and advantageously used, and to protect the same, and to employ such persons and make such payments and disbursements as may be needful and proper in so doing.

It is further ordered, that the said receiver, within the next thirty days, file with the clerk of the court a proper bond with sureties, to be approved by the judge of this court, in the penal sum of fifty thousand dollars, conditioned for the faithful discharge of his duties, and to account for all funds given into his hands according to the orders of this court.

Each and every of the officers, attorneys, agents or employés of the said Atlantic and Pacific Railroad Company, and all other persons or corporations are hereby required to turn over and deliver to such receiver, or his duly constituted representatives, any and all railroad property, books of account, vouchers, deeds, leases, contracts, bills, notes, accounts, moneys, stocks, bonds or obligations, or other property in his or their hands and in his or their control; and
51 each and every of such attorneys, officers, agents, employés, persons or corporations are hereby required and commanded to obey and conform to such orders as may be given them from time to time by such receiver, or his duly constituted representatives, in conducting the operations of such property, and in discharge of his duties as such receiver.

And it is further ordered, adjudged and decreed, that the said defendant, its agents, officers and servants, and all other persons be, and the same are hereby restrained and enjoined during the pendency of this action from interfering with, transferring, selling, or disposing of any of the property of the said defendant railroad company, or from taking possession of or in any manner whatever interfering with the same or any part thereof, or from interfering in any manner whatever with the possession or management of any of said property over which the receiver is hereby appointed or from interfering in any manner to prevent the discharge of his duties

or from the operation of the said property under the order of this court.

And the said receiver is hereby fully authorized to operate the said Atlantic and Pacific railroad and to manage the property of the said corporation in such manner as will in his judgment produce the most satisfactory results, consistent with the discharge of the public duties imposed thereon; and to collect and receive all of the income therefrom, and all of the debts due the said company of all kinds, and for such purpose is hereby vested with the full power in his discretion to employ and discharge and to fix the compensation of such officers, agents, attorneys, managers, superintend-
52 ents and employés as are necessary to aid in the discharge of his duties, except that the said receiver shall continue in service all the officers and employés of the receivers heretofore appointed by this court in the case of The Mercantile Trust Company *vs.* The Atlantic and Pacific Railroad Company *et al.*, numbered 999 on the calendar of this court, in the respective positions they occupy, for at least one month after qualification and entrance upon duty by said receiver, provided that for special cause, approved by the court, any or either of said officers or employés may be sooner removed or discharged; and provided further, that this exception shall not prevent discharge or dismissal from service of any officer or employé for neglect of duty or disobedience of orders or regulations given or prescribed; and he shall have power, with the sanction of the court, to redeem any and all of the securities of the company now pledged as securities on loans of money.

The said receiver is fully authorized and empowered to institute and prosecute such suits that may be necessary in his judgment for the proper protection of the property and trusts hereby vested in him, and to likewise defend all such actions instituted against him as such receiver, and also to come in and aid in the prosecution and defense of any of the suits now pending against the Atlantic and Pacific Railroad Company, the prosecution or defense of which will in his judgment be necessary for the proper protection of the property placed in his charge.

It is further ordered, adjudged, and decreed, that out of the moneys that shall come into his hands, as such receiver, from the operation of the said railroad properties, or otherwise, he shall:

53 First. Pay all current expenses incident to the creation and administration of this trust and to the operation of the said railways or railroads and properties.

Second. Pay all sums due or to become due connecting or intersecting lines of railways, arising from the interchange of business and for track service of other railroads used by said defendant in the operation of its lines and traffic, and car-mileage balances and all amounts now due from the defendant on its road or properties, constituting part of the said system, for taxes and assessments upon the property, or any part thereof.

Third. To pay all sums which are now due and have accrued since the first day of July, 1893, for material or supplies used in the

operation or maintenance of said defendant railroad company; and also all sums or amounts due for wages to officers, agents or employés of the defendant railroad company accruing since the first day of July, 1893.

Fourth. To pay all liabilities or damages which may have been or shall be incurred by any person or corporation who may have become sureties of the said defendant company on stay, supersedeas or cost bonds, or upon any garnishment proceedings, or bonds of other like character without regard to the date of said bonds.

It is further ordered, adjudged and decreed, that the appointment of the said Charles W. Smith as such receiver, and the powers by this order conferred upon him, shall be and become operative, in force and vested from the first day of February, A. D. 1896; that the transfer of the property from the receiver in the Mercantile Trust Company case to the receiver hereby appointed is made upon the express condition to which the United States Trust Com-
54 pany of New York expressly assents, that this court may in this case, enforce all priorities and allowances which it could have enforced in the said Mercantile Trust Company case if there had been no change in the receivership.

N. C. COLLIER,
Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Second Judicial District Court Thereof.

55 And thereafter on, to wit, the 10th day of April, 1896, there was duly made and entered of record in said cause in said court a decree of foreclosure of mortgage, which said decree is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

United States Trust Company of New York, Complainant, *against* Atlantic and Pacific Railroad Company; Atchison, Topeka and Santa Fe Railroad Company; St. Louis and San Francisco Railway Company; Aldace F. Walker and John J. McCook, as Receivers of the Property and Franchises of Atlantic and Pacific Railroad Company; Aldace F. Walker and John J. McCook, as Receivers of the Property and Franchises of Atchison, Topeka and Santa Fe Railroad Company; Aldace F. Walker and John J. McCook, as Receivers of the Property and Franchises of St. Louis and San Francisco Railway Company; The Mercantile Trust Company, and The Boston Safe Deposit and Trust Company, Defendants.	In Equity. No. 1122.

This cause having come on to be heard upon the bill of complaint and the answers thereto, and having been referred by order made November 16, 1895, to Owen N. Marron, as special master, to take proof and report to the court upon certain matters, and propositions mentioned in said order of reference, and the said special
56 master having duly filed his report thereon in favor of the complainant, and the said report having been confirmed by order of this court made at the March term, 1896, which directed that a decree be prepared and submitted for signature in accordance with said report as so confirmed, now, therefore, this cause having again come on to be heard upon the bill of complaint herein and the exhibits thereto annexed, and the answers of all the defendants except The Boston Safe Deposit and Trust Company, all said other defendants having appeared and answered, and upon the report of said special master, and the findings and decision upon the hearing before him, and upon the order of this court confirming said report, and upon all the papers and proceedings in this cause, and upon proof of the due service of said bill and of the subpœna issued thereon upon the defendant The Boston Safe Deposit and Trust Company, and that said defendant has made default in appearing and answering or pleading to said bill, and upon the order *pro confesso* against it heretofore entered herein, and the court having heard counsel thereon and being fully advised in the premises; now, upon motion of the United States Trust Company of New York, by its solicitors,

It is ordered, adjudged and decreed:

1. That all the material allegations in the bill of complaint herein are true.

2. That the complainant is a corporation duly created and existing under the laws of the State of New York, and is a citizen of said State, and has its principal office and place of business in the city of New York, and, as such corporation, was, and is, fully au-
57 thorized and empowered to hold in trust the property conveyed to it in trust, as hereinafter found, and to execute the trust reposed in it under and by virtue of the mortgage or deed of trust hereinafter described.

3. That the defendant Atlantic and Pacific Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the United States of America, to wit: an act of Congress approved July 27, 1866, being a public act; and the acts of Congress supplementary thereto and amendatory thereof, including particularly an act approved April 20, 1871, which authorized the said corporation to mortgage its property and franchises as hereinafter mentioned.

4. That the defendant Atlantic and Pacific Railroad Company duly complied with the provisions of said acts of Congress, and became and was thereby duly authorized and empowered to, and did thereafter, construct or acquire by purchase or lease, and own, control, operate and maintain the railroads and other property hereinafter mentioned.

5. That in order to secure the bonds to be issued by it, as hereinafter found, said defendant Atlantic and Pacific Railroad Company, on or about the 1st day of July, 1880, duly made, executed and delivered to the complainant, as trustee, a certain mortgage or deed of trust, called the Western Division first mortgage, of said defendant, bearing date the 1st day of July, 1880, in and by which it conveyed to the complainant, as trustee all and singular its railway and property, real, personal and mixed, and all its rights, privileges and franchises of every kind and description and wheresoever situated, then or thereafter composing or pertaining to that part of the railroad and telegraph line of said defendant known as the Western division.

58 That since the execution of said Western Division first mortgage, said defendant Atlantic and Pacific Railroad Company has acquired a large amount of railroad, engines, cars and other equipment and other personal property, and a large amount of real estate, rights of way, lands and land grants, and interests in and rights to real estate, lands and land grants, and other property, rights, privileges and franchises, all of which became and are subject to the lien of said mortgage, and the said mortgage is and remains a valid and subsisting lien upon all the property described therein, and upon said subsequently acquired property, and upon all the property, rights and franchises pertaining to said Western division granted to and conferred upon the said Atlantic and Pacific Railroad Company by the acts of Congress hereinbefore mentioned or subsequently acquired thereunder.

6. That under and in accordance with the provisions of said Western Division first mortgage, said defendant, Atlantic and Pacific Railroad Company, on and subsequently to said 1st day of July, 1880, duly made, executed and delivered its bonds, all bearing date on that day, to the amount of $16,000,000, as follows, viz:

(a.) 15,950 coupon bonds, each for the sum of $1,000, amounting in the aggregate to $15,950,000, in and by each of which bonds the said defendant Atlantic and Pacific Railroad Company promised to pay to the complainant as trustee, or to the bearer thereof on the 1st day of July, 1910, at the agency of the railroad company in the city of New York, the sum of $1,000 in gold coin of the United States of America, and also to pay interest thereon at the rate of six
59 per cent. per annum in like gold coin semi-annually on the first days of January and July in each year, at the agency of said company in the city of New York, on presentation as they severally became due, of coupons for such interest annexed to said bonds and payable to bearer.

(b.) Ten registered bonds, each for the sum of $5,000, and amounting in the aggregate to $50,000, in and by each of which bonds the said defendant Atlantic and Pacific Railroad Company promised to pay to the said trustee, or to the registered holder thereof, the sum of $5,000, on the first day of July, 1910, in gold coin of the United States of America, at the agency of the railroad company in the city of New York, and also to pay interest thereon at the rate of six per cent. per annum in like gold coin semi-annually on the first days of January and July in each year, at the agency of the railroad company in the city of New York.

7. That all of said bonds, amounting in the aggregate to $16,000,000 of principal, were duly issued by said defendant Atlantic and Pacific Railroad Company, and authenticated by the certificate thereon signed by the complainant as trustee in accordance with the provisions of said bonds and of said Western Division first mortgage or deed of trust, and were duly negotiated and delivered for value prior to the defaults hereinafter mentioned; and all of said bonds are now outstanding and are valid obligations of said defendant Atlantic and Pacific Railroad Company and were so outstanding at the time of the commencement of this suit, and the said Atlantic and Pacific Railroad Company is indebted to the holders thereof in the
60 amount of $16,000,000 on account of the principal thereof, together with the interest thereon as hereinafter found.

8. That prior to the making and issue of the said Western Division first-mortgage six per cent. bonds, the defendants, Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company, acquired the control of the defendant Atlantic and Pacific Railroad Company through the purchase and ownership of a majority of its capital stock; that the said bonds were issued and disposed of for the purpose of completing the line of railroad of the Atlantic and Pacific Railroad Company, known as its Western division, from Albuquerque, on the Rio Grande river, in the Territory of New Mexico, to The Needles, on the western side of the Colorado river, in the State of California, in order to form,

with the railroads of the said Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company a through line to the Pacific coast, and that for good and valuable considerations, as additional security for the payment of the principal and interest of the said bonds, the said Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company on the first day of July, A. D. 1880, made and executed an agreement whereby they severally covenanted and agreed with the Atlantic and Pacific Railroad Company and the trustee of said mortgage on behalf of the bondholders thereunder that if the earnings from the said Western division should prove insufficient to pay all coupons on said bonds as they matured, they would contribute ratably, for the purpose of paying and canceling the same, such sum as might be necessary from their
61 respective earnings upon all business arising from and delivered to said Western division, not exceeding twenty-five per cent. of the gross amount of their said described earnings.

9. That on or about the 1st day of October, 1880, the defendant Atlantic and Pacific Railroad Company made, executed and delivered to the defendant, The Boston Safe Deposit and Trust Company as trustee, a certain agreement called an indenture, bearing date on that day, in and by which it agreed with the said trustee to make up and furnish to said trustee from time to time a fair and just account of payments and expenses and gross and net earnings of said Western division for the six months ending on each first day of January and July in each year, so as to exhibit the true sum applicable to the payment of interest on the income bonds, referred to in said indenture, and to pay the said interest or so much thereof as had been earned on the first days of April and October in each year. That the said indenture was made for the purpose of securing the payment of the principal and interest of bonds to be issued under the said indenture to an amount not exceeding $18,750 a mile of completed road, and that such income bonds have been issued thereunder and are now outstanding to an amount in the aggregate of $12,000,000. That the lien and obligation of the said bonds against the defendant Atlantic and Pacific Railroad Company and its property, if any, are inferior and subordinate to the lien and obligation of the bonds secured by the said Western Division first mortgage.

10. That on or about the first day of September, 1887, the defendant Atlantic and Pacific Railroad Company made, executed
62 and delivered to the defendant The Mercantile Trust Company, its certain second mortgage or deed of trust upon the said Western division, bearing date on that day, in and by which it conveyed to the said Mercantile Trust Company, as trustee, the property in said mortgage described, being substantially the same property previously conveyed by the said Western Division first mortgage as hereinbefore described. That the said mortgage was made to secure the due payment of the principal and interest of bonds known as second-mortgage six per cent. guaranteed gold bonds of the Atlantic and Pacific Railroad Company, Western division, limited to $10,000 a mile of completed railroad of the Western division

of said railroad company, to be guaranteed severally, but not jointly, as to the payment of one-half of the principal and interest by the Atchison, Topeka and Santa Fe Railroad Company and as to the payment of one-half of the principal and interest by the St. Louis and San Francisco Railway Company, which said last-named two companies joined in the execution of the said mortgage as guarantors of the payment of said principal and interest; that the said bonds were each for the principal sum of $1,000, payable on the first day of September, 1907, and to bear interest at the rate of six per cent. per annum, payable semi-annually on the first days of March and September in each year, at the agency of said railroad company in the city of New York.

That the defendant Atlantic and Pacific Railroad Company has made and issued, and there are now outstanding such second-mortgage six per cent. guaranteed gold bonds for the principal sum of $5,500,000, all, or the greater part of which, were taken by the
63 defendants Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company as security for, or in payment of, debts claimed to be due to them from, or advances made by them to, the Atlantic and Pacific Railroad Company, and such bonds are now held by them except bonds to the amount of $403,000 which are held by others. That the lien and claim of the said second-mortgage six per cent. guaranteed gold bonds upon the railroad and property of the defendant Atlantic and Pacific Railroad Company, if any, are expressly subject, subordinate and inferior to the lien of the Western Division first mortgage hereinbefore referred to, and to the bonds issued thereunder to the amount of $16,000,000, as hereinbefore found; but that the lien of the said second-mortgage bonds *are* superior to that of the income bonds mentioned in the last preceding paragraph of this decree.

11. That on each of the first days of January and July, 1894, and January and July, 1895, there became due upon said Western Division first-mortgage six per cent. bonds outstanding to the amount of $16,000,000, and the holders thereof were entitled to collect and receive from said defendant Atlantic and Pacific Railroad Company the semi-annual instalments of interest due on each of said bonds on said dates, and that since said last-mentioned date and on January 1, 1896, there became due and the holders of said bonds became entitled to collect and receive a further semi-annual instalment of interest due on that day, but the said defendant Atlantic and Pacific Railroad Company in each instance has made default in the payment of said interest, and that no payment has been made
64 on account thereof by said company or by any one on its behalf, and that the said semi-annual instalments of interest falling due on said dates, respectively, together with certain interest previously due on said bonds, remain wholly due and unpaid and amount at the date of this decree to the following sums:

Interest and coupons due January 1, 1894.....	$480,000 00
Interest and coupons due July 1, 1894.....	480,000 00
Interest and coupons due January 1, 1895.....	480,000 00

Interest and coupons due July 1, 1895.....	480,000 00
Interest and coupons due January 1, 1896.....	480,000 00
Interest on said bonds to the date of this decree.....	266,666 66
Total.....	$2,666,666 66

12. That the complainant, as such trustee, has from time to time collected and received from the sales of land covered by said mortgage various notes and sums amounting to $83,823.50, and now holds the same as trustee under said first mortgage.

That the said sum should be applied to and deducted from the amount due for interest upon said bonds, leaving the total amount now due and payable for interest thereon $2,582,843.16.

13. That default having been made in the payment of interest upon all of said first-mortgage bonds, and such default having continued during more than six consecutive months, the holders
65 of the entire amount of the bonds secured by the said first mortgage joined in a demand requiring the complainant, as trustee under said mortgage or deed of trust, to file said bill of foreclosure and have concurred in the application for a decree for the foreclosure of said mortgage and the sale of the mortgaged premises; and that the holders of all said bonds have since the default and its continuance as aforesaid, duly elected that the principal of said bonds shall be considered due, and that, by reason of the facts hereinbefore found, the whole amount of the principal of said bonds is unpaid, as well as all interest due thereon, as hereinbefore mentioned, and that the complainant is entitled to the foreclosure and sale of the premises, covered by the said first mortgage as an entirety, and the application of the proceeds of sale to the payment of the said interest and principal as hereinafter decreed.

14. That the said Western Division first mortgage, dated July 1, 1880, is a lien to secure the payment of the principal and interest of said first-mortgage bonds issued by the defendant railroad company thereunder as hereinbefore found, together with the interest and coupons for interest hereinbefore found to be due and payable on said bonds, and that the same is a valid and subsisting lien, prior and superior to all other liens and claims, upon the property described in said mortgage as follows (the words "party of the first part" referring to Atlantic and Pacific Railroad Company), viz:

"The franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery supplies and all property of every de-
66 scription now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part, known as the Western division, beginning at Albuquerque on the Rio Grande river, in the Territory of New Mexico, and thence running by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by the party of the first part for crossing, and thence by the most

practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described; and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges and ap-urtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and in equity, of the party of the first part, of, in and to the same, and any and every part thereof with the appurtenances," including all the real estate, lands and land grants, whether patented or unpatented, or surveyed or unsurveyed, or otherwise, in which the said Atlantic and Pacific Railroad Company or said mortgagee has any interest, and all interests therein and rights thereto, and also all tracks, lines, rails, bridges, ways, buildings, piers, wharves, structures, erections, fences, walls and fixtures erected on or pertaining to said Western division, as now constructed and operated, and all franchises,
67 privileges and rights of the said company, and also all the locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured or unmanufactured materials, coal, wood and supplies of every kind belonging or appertaining to the defendant railroad company.

And also all choses in action of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and account, of every kind and description, all papers, maps, inventories, and documents in anywise referring or relating to said property and the franchises, and also all franchises and property, and all personal rights or interests in franchises or property of every kind and description, real or mixed, and wherever the same may be situate, held or owned by the defendant railroad company or in which said company has any interest.

15. That under and pursuant to orders made in said cause, and in the suit of the Mercantile Trust Company against The Atlantic and Pacific Railroad Company in which receivers were originally appointed, there have been duly issued and there are now outstanding and unpaid certain receivers' notes or certificates of indebtedness amounting in the aggregate on the 10th day of April, 1896, to the sum of $503,133 of principal and bearing interest at the rate of six per cent. per annum, the holders of which are entitled to payment in priority to the holders of said first-mortgage bonds. That in addition to said receivers' notes or certificates, there exists a further amount of indebtedness and obligations incurred by the said receivers in the operation and care of the railroad and property of said defendant railroad com-
68 pany, the holders of which indebtedness and obligations, so far as the same have been lawfully incurred, are also entitled to the payment thereof out of the income of said railroad and property and out of the proceeds of a sale thereof in priority to the holders of the bonds issued under said first mortgage. That neither said receiver nor said defendant Atlantic and Pacific Railroad Company has any means of paying the said indebtedness and obliga-

tions, and that the said defendant railroad company is absolutely insolvent; and that it is necessary for the protection of the holders of said receivers' certificates and said other debts and obligations of said receivers, as well as of the holders of said bonds and coupons issued under said first mortgage and of the other creditors of the defendant railroad company that the railroad, property and franchises of said defendant railroad company shall be sold without delay and that the proceeds thereof be applied to the payment of said receivers' notes or certificates and other receivers' indebtedness and said bonds and other obligations.

16. That the property of said defendant Atlantic and Pacific Railroad Company is so situated that the same cannot be sold in parcels without great injury to all parties in interest, and that it is expedient that the same shall be sold as an entirety as hereinafter provided.

17. It is accordingly further ordered, adjudged and decreed that the complainant United States Trust Company of New York, distribute said sum collected by it from the sales of land amounting, treating the notes as money, together to the sum of $83,823.50,
69 among the holders of said first mortgage bonds, and coupons *pro rata* according to the amounts due thereon respectively upon presentation of said bonds and coupons.

18. It is further ordered, adjudged and decreed that the defendant Atlantic and Pacific Railroad Company pay, or cause to be paid, within ninety days after the entry of this decree to the complainant United States Trust Company of New York, for the use and benefit of the holders of said first-mortgage bonds and the coupons for interest thereon the amount hereinbefore found to be due for interest on said first-mortgage bonds, namely, $2,582,843.16, with interest thereon from the date of this decree to the date of payment.

Upon payment of said amount the same shall be distributed among the respective holders of the said first-mortgage bonds and the coupons for interest thereon in payment of the respective amounts hereinbefore found due thereon.

In case the said amount shall be paid as herein decreed, then any of the parties hereto may apply to this court for such further relief and for such further directions as may be just and equitable.

19. It is further ordered, adjudged and decreed that, in default of such payment by the defendant railroad company, or by any one claiming under it, or by any one for its account within the time directed as aforesaid, the said property, premises and franchises, of every kind described in said first mortgage or by this decree adjudged to have become subject thereto, shall be sold as hereinafter directed, and all the right, title, estate, interest and equity of redemption of the defendant Atlantic and Pacific Railroad Company
70 and of all other parties hereto, and of all persons claiming or to claim under said railroad company, of, in or to the said property, premises and franchises, and every part and parcel thereof, shall be forever barred and foreclosed.

The sale of said railroad, property, and franchises shall be made by Owen N. Marron, heretofore appointed special master in this

cause by consent of all parties hereto, (which consent, together with his special fitness, are deemed sufficient reasons for his appointment), who is hereby directed to make and conduct said sale, and to execute and deliver a deed or deeds of conveyance of the property sold to the purchaser or purchasers thereof upon an order confirming such sale and upon payment or settlement of the purchase price bid, as herein provided.

The sale shall be at public auction to the highest bidder or bidders, at Gallup, in the county of Bernalillo, in the second judicial district aforesaid, at the passenger station, upon the mortgaged premises sold, on a day and at an hour to be fixed by said special master in accordance with the request of the solicitors for the complainants, and notice of the time, place, and terms of said sale, describing briefly the property to be sold and referring to this decree, shall be published at least once in each week for the term of four successive weeks preceding the day of sale, in at least one newspaper, in each of the following cities, respectively, viz: New York; Albuquerque, New Mexico; Prescott, Arizona; and Los Angeles, California.

The special master may, at the request of the solicitors for the complainant adjourn or postpone said sale, and may without further notice, proceed with said sale on any day to which the same
71 may thus have been adjourned, but he may give such further notice of sale in addition to the notice above described as he may think proper or as the complainant may request.

The special master shall receive no bid from any one offering to bid who shall not first deposit with him as a pledge that he will make good his bid in case of its acceptance the sum of $100,000 in money or by certified check upon any national bank or any trust company approved by the special master, or $250,000 par value of the bonds secured by said first mortgage. The deposit so received from any unsuccessful bidder shall be returned to him when the property shall be struck down, and the deposit received from the successful bidder shall be deposited with the State Trust Company of New York, subject to the order of said special master, to be applied on account of the purchase price of the property.

The special master shall accept no bid for said railroad property and franchises unless the same shall at least equal the sum of $5,000,000, and unless such sum shall be bid, the special master shall adjourn the sale and apply to the court for further instructions.

Upon the acceptance of any bid, the purchaser shall forthwith deposit with the said State Trust Company, subject to the order of said special master, the sum of $250,000 in cash or by a certified check upon any national bank or any trust company approved by the special master, or $500,000 par value of the bonds secured by said first mortgage, but any cash or bonds which may have been previously deposited by the successful bidder as a pledge that
72 he would make good his bid shall be received on account of the amount so required of him on the acceptance of his bid.

In case any bidder or purchaser shall fail to make good his bid

upon its acceptance by the special master or shall fail after such acceptance to comply with any orders of the court relating to the payment thereof or the consummation of the purchase, then the sums in cash or bonds deposited by such purchaser or purchasers as hereinbefore provided shall be forfeited as a penalty for such failure and shall be applied toward payment of the expenses of a resale and towards making good any deficiency or loss in case the property shall be sold at a less price upon such resale.

If any sale for which a deposit has been made shall not be confirmed by the court, such deposit shall be returned to the bidder.

The purchaser shall, upon confirmation of the sale by the court, make such further payment or payments in cash, on account of the purchase price bid, for the payment of the sums to be paid out of the proceeds of sale as hereinafter provided as the court may from time to time direct. The balance of the purchase price not required to be paid in cash may either be paid in cash or the purchaser may satisfy and make good the balance of his bid in whole or in part by turning in to be canceled or credited, as hereinafter provided, any of the first-mortgage bonds and coupons to be paid out of the proceeds of sale upon distribution thereof as hereinafter provided, and such purchaser shall be credited therefor on account of the purchase price, such sums in cash as would be payable on such
73 bonds and coupons out of the proceeds of sale, if the whole amount of the purchase price were paid in cash. The court reserves the right to resell the property upon such notice as the court shall direct in case the purchaser shall fail or omit to make any payment on account of any unpaid balance of the purchase price within thirty days after the entry of an order requiring such payment.

All sums of moneys, and bonds received by the special master shall be forthwith deposited with said State Trust Company subject to the order of this court.

The complainant United States Trust Company of New York, as trustee, or any holder or holders of bonds secured by said first mortgage, or any party to this suit may bid and purchase at such sale.

The purchaser or purchasers at said sale, and his or their successors or assigns, shall have the right within ninety days after the confirmation of the sale and delivery of the deed as hereinafter provided to elect whether or not to assume or adopt any of the leases and contracts sold with the railroad, and other property and franchises, and the purchaser or purchasers, his or their successors or assigns, shall only be held to have assumed such of said leases or contracts as he or they shall so elect to assume.

The purchaser or purchasers and his or their successors or assigns shall as part consideration and purchase price of the property purchased, and in addition to the sum bid, take the same and receive the deed therefor upon the express condition that he or they or his or their successors or assigns shall pay, satisfy and discharge any unpaid compensation which shall be allowed by the court to
74 the receiver, and any indebtedness and obligations or liabilities which shall have been legally contracted or incurred by

the receiver before delivery or possession of the property sold, including the receiver's notes or certificates hereinbefore mentioned, and also any indebtedness and liabilities contracted or incurred by said defendant railroad company in the operation of its railroad prior to the appointment of receivers, which are prior in lien to said first mortgage, and which shall not be paid or satisfied out of the income of the property in the hands of the receiver, upon the court adjudging the same to be prior in lien to said mortgage and directing payment thereof, provided that suit be brought for the enforcement of such indebtedness, obligation or liability within the period allowed by any statute of limitations applicable thereto. All payments for any such purpose made by the purchaser in advance of the final accounting and discharge of the receiver shall be treated as advances and subject to final adjustment upon such accounting.

In the event that said purchaser or purchasers shall refuse, after demand made, to pay any such indebtedness, obligations or liabilities, the person holding the claim therefor may, upon fifteen days' notice to said purchaser or purchasers, their successor or successors, assign or assigns, file his petition in this court to have such claim enforced against the property aforesaid in accordance with the usual practice in relation to claims of a similar character; and such purchaser or purchasers and his or their successor or successors, assign or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, and either
75 party shall have the right to appeal from any judgment, decree or order made thereon. And jurisdiction of this cause is retained by this court for the purpose of enforcing the foregoing provisions of this decree; and the court reserves the right to retake and resell said property in case the purchaser or purchasers, his or their successors or assigns, shall fail to comply with any order of the court in respect to the payment of such prior indebtedness, obligations or liabilities within thirty days after service of a copy of such order.

Any such claim for indebtedness, obligations or liabilities which shall not have been presented in writing to the receiver or filed with the clerk of this court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the receiver of a notice to the holders of such claims to present the same for allowance. The receiver shall publish such notice at least once a week for the period of six weeks in one or more newspapers published in Albuquerque, New Mexico; Prescott, Arizona, and Los Angeles, California, upon the request of any purchaser or purchasers after delivery of the possession of the property to them, and any such claims, which shall not be so presented or filed within the period of six months after the first publication of such notice, shall not be enforceable against said receiver nor against the property sold nor against the purchaser or purchaser-, his or their successors or assigns.

Any such purchaser or purchasers, and his or their successors and assigns, shall have the right to enter his or their appearance
76 in this court or any other court, and he or they, or any of the parties to this suit, shall have the right to contest any

claim, demand or allowance existing at the time of the sale and then undetermined, and any claim or demand which may arise or be presented thereafter, which would be payable by such purchaser or purchasers, his or their successors or assigns, or which would be chargeable against the property purchased, in addition to the amount bid by such purchaser or purchasers at the sale, and may appeal from any decision relating to any claim, demand or allowance.

20. It is further ordered, adjudged and decreed that the funds arising from the sale of the said premises shall be applied as follows:

(1.) To the payment of the costs of this cause and of all proper expenses attendant upon said sale, including the compensation of the special master and the payment of all charges, compensations, allowances and disbursements, of the complainant United States Trust Company of New York, as trustee, and its solicitors and counsel, and of the receiver and his solicitors and counsel, and also all such other proper allowances, compensation and disbursements to the parties or their counsel, as the court shall order. All of the payments to be made under this subdivision shall be hereafter fixed and allowed and taxed by this court.

(2.) To the payment of the said receiver's notes or certificates heretofore issued under the orders of this court, to the amount of $503,133, and other indebtedness and obligations lawfully incurred by the said receiver, together with the interest accrued thereon to the date of payment.

77 (3.) The balance of the fund realized from said sale shall be applied to the payment of the principal of said Western Division first-mortgage bonds and the interest and coupons thereon, with interest from the date of this decree to the date of payment, of which notice shall be given by the special master as hereinafter provided, upon the presentation of said bonds and coupons, which shall be canceled if paid in full.

In case said balance is insufficient to pay said bonds and coupons and interest thereon in full, then the same shall be paid *pro rata* without discrimination between the bonds and coupons, and each of said bonds presented for payment shall be stamped by the special master, so as to show the amount which has been paid on such bonds and the coupons thereto attached, or if presented by the purchaser or purchasers the amount credited as paid thereon, and shall be returned to the holders thereof. Any detached coupon shall, when presented, be stamped or canceled in like manner.

(4.) The balance of said fund after making all the foregoing payments, if any, shall be applied to the payment of the principal of the said second-mortgage bonds, and the interest and coupons thereon, of which notice shall be given by the special master, and which payments shall be made under the direction of this court. Said second-mortgage bonds and coupons shall be canceled if paid in full, but if said balance is insufficient to pay said second-mortgage bonds and said coupons for interest thereon in full, then the same shall be paid *pro rata*, without discrimination between the

bonds and coupons, and each of said bonds when presented
78 for payment shall be stamped by the special master, so as to show the amount which has been paid upon said bonds and coupons thereto attached. Any detached coupons for interest on said bonds shall be stamped in like manner.

(5.) If, after making all the above payments, there shall be a surplus, then the same shall be applied as the court shall thereafter order and direct.

Whenever the special master shall be prepared to pay out of the proceeds of sale any of the classes of claims or bonds or coupons to be paid as above specified, he shall give notice of the time when and place where he will be prepared to make such payment by publication at least once a week for two successive weeks in at least one newspaper in each of the following cities, viz: Albuquerque, New Mexico, Prescott, Arizona, and Los Angeles, California, and no holder of any claim or bond or coupon, of the payment of which notice shall have been so given, who shall fail to present the same for payment at the time and place specified, shall be entitled to the payment of any interest thereon after that date out of the proceeds of sale.

21. It is further ordered, adjudged and decreed, that upon payment of the purchase price bid by the purchaser or purchasers of said property, or upon making such provision for the payment thereof as the court shall approve, the said special master making the sale shall execute a deed conveying the railroad, property and franchises purchased to such purchaser or purchasers, or his or their successors or assigns; and that upon the execution and delivery of such deed the grantee therein shall be let into possession of the premises conveyed, and that the receiver and the complainant herein shall deliver such property
79 over to the purchaser or purchasers, his or their successors or assigns, together with any property and income acquired or received by the receivers in the management or operation of the mortgaged premises; subject, nevertheless, to the condition that the court may retake and resell the property in case the purchaser or purchasers, his or their successors or assigns, shall fail to pay any balance of the purchase price remaining unpaid, or to comply with any order of the court with respect to the payment of the prior indebtedness, obligations and liabilities as hereinbefore provided, within thirty days after the service of a copy of such order.

The purchaser or purchasers shall, after such delivery of the premises, hold, possess and enjoy the said premises and property and all the rights, privileges, immunities and franchises appertaining thereto, as fully and completely as the said defendant Atlantic and Pacific Railroad Company, or the said complainants as such trustee, or the said receiver, now holds or enjoys the same, or held or enjoyed or was entitled to hold or enjoy the same at the time of the execution of said first mortgage or at any time since; and the purchaser or purchasers, and his or their successors and assigns, shall thereupon be entitled to have and to hold the premises so

conveyed free and discharged from the lien and incumbrance of said several mortgages hereinbefore mentioned, and from the claims of all parties to this suit and those claiming under them or any of them, save only as herein expressly reserved.

22. It is further ordered, adjudged and decreed, that the
80 defendant Atlantic and Pacific Railroad Company, shall, at the time of the execution of said deed by said special master as a further assurance to the purchaser or purchasers, execute its deed or join with said special master in the execution of the deed to be made by him, and shall thereby convey and release to the purchaser or purchasers, their successors or assigns, the property and franchises conveyed to such purchaser or purchasers by said special master, or covered by said first mortgage, and all of its right, title and interest therein or thereto; that the said United States Trust Company of New York, as trustee under said first mortgage, shall likewise, at the time of the execution of such deed, transfer and release to such purchaser or purchasers all its right, title and interest under the said first mortgage, in or to the said property and franchises; and further, that the receiver shall, at the time of the delivery of said deed by the special master, make, execute and deliver to such purchaser or purchasers, their successors or assigns, a good and sufficient deed of conveyance of any and all property of the defendant railroad company vested in or standing in the name of the said receiver, or to which said receiver has in any manner acquired title as such.

The said special master is hereby required promptly to make a full report of his proceedings under the order of sale herein, and such supplemental reports from time to time as may be necessary or desirable to show fully his action in the premises.

23. It is further ordered, adjudged and decreed, that in case the proceeds of said sale shall not be sufficient to pay in full the amounts
81 hereinbefore found to be due for principal and interest upon said first-mortgage bonds of the defendant Atlantic and Pacific Railroad Company, then the said special master shall report to the court the amount of the deficiency.

24. It is further ordered, adjudged and decreed, that all questions not hereby disposed of, including the discharge of the receiver and the settlement of his accounts, are hereby reserved for future adjudication; that any party to this cause may at any time apply to this court for further relief, at the foot of this decree, as well as for modifications thereof, in respect to the terms or condition of the said sale, or to the distribution of the proceeds thereof.

NEEDHAM C. COLLIER, *Judge.*

82 And thereafter, to wit, on the 4th day of May, 1897, there was duly made and entered of record in said court in said cause a decree confirming the foreclosure sale; which said decree is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

United States Trust Company of New York, Complainant,
against
Atlantic and Pacific Railroad Company; Atchison, Topeka and Santa Fe Railroad Company; St. Louis and San Francisco Railway Company; Aldace F. Walker and John J. McCook, as Receivers of the Property and Franchises of the Atlantic and Pacific Railroad Company; Aldace F. Walker and John J. McCook, as Receivers of the Property and Franchises of Atchison, Topeka and Santa Fe Railroad Company; Aldace F. Walker and John J McCook, as Receivers of the Property and Franchises of St. Louis and San Francisco Railway Company; The Mercantile Trust Company, and The Boston Safe Deposit and Trust Company, Defendants.

In Equity. No. 1122.

Now come again the parties to the action, except the Boston Safe Deposit and Trust Company, by their respective solicitors and counsel (said Boston Safe Deposit and Trust Company having made default in appearing and answering or pleading to the bill of complaint herein and an order *pro confesso* against it heretofore
83 having been entered herein), and come also the purchasers Aldace F. Walker, R. Somers Hayes and Victor Morawetz, by their solicitor; and the petitions of the complainant and of said purchasers that the report of Owen N. Marron, special master, heretofore filed herein, should be approved, and that the sale to said purchasers of the railroads, properties and franchises of the Atlantic and Pacific Railroad Company described in the decree entered in this cause foreclosing the Western Division first mortgage of said company, dated July 1, 1880, and also described in the notice of sale published by said special master pursuant to such decree, should be confirmed and made absolute, came on to be heard.

And it appearing by such report of said special master that he has fully complied with the directions in the said decree as to the sale of said railroad, property and franchises mentioned in said decree, and that such purchasers were the highest and best bidders therefor, and that the same were struck off to such purchasers for the sum of $12,000,000, subject, however, to all the terms, conditions, reservations and provisions in the said decree contained.

And it further appearing by the said special master's report, and by the said petition of said purchasers, that the said purchasers have made the payments thus far obligatory upon them, and have deliv-

ered over to the special master, on account of their bid and to make payment thereon, $500,000 par value of the bonds secured by said Western Division first mortgage of said Atlantic and Pacific Railroad Company described in said decree, such bonds having the unpaid coupons thereto attached.

84 And it appearing by the said petition that the said purchasers hold or control, and offer to turn in to be credited on account of their bid, $16,000,000 par value of the said bonds secured by said Western Division first mortgage of the Atlantic and Pacific Railroad Company, including the bonds delivered over to the special master as aforesaid, the same being all of said bonds issued and outstanding, and that they also hold or control $289,144.43 par value of the receiver's notes or certificates issued by the receiver of said Atlantic and Pacific Railroad Company.

And no sufficient cause being shown against the report of the special master or against the granting of the petitions of the complainant and of the said purchasers.

Now, on motion of the complainant United States Trust Company of New York, by Edward W. Sheldon and Neill B. Field, its solicitors, and of the said purchasers, by their solicitor, and all the other parties (except the Boston Safe Deposit and Trust Company, which made default as aforesaid) appearing by counsel as aforesaid and consenting that the said motions for confirmation of said sale and of the said report of said special master made thereon may be now heard and determined and all questions thereunder adjudicated.

It is ordered, adjudged and decreed that the said report of Owen N. Marron, the special master, is in all things approved and confirmed, and that the sale by him made to the said purchasers at and for the sum of $12,000,000 of all and singular the said railroad, property, rights, privileges and franchises, in and by the said decree foreclosing said Western Division first mortgage of the Atlantic and Pacific Railroad Company, directed to be sold, be, and the same

85 hereby is, in all things ratified, approved, confirmed and made absolute;

Subject, however, to all equities reserved and to all and singular the terms and conditions of such sale and to the payment of the sums hereinafter required to be paid by such purchasers, their successors or assigns, and to all and singular the terms and provisions hereainafter contained; and this court expressly reserves and retains jurisdiction of this cause and power to enforce all the terms and conditions of said sale, and also all provisions of this decree, including the right to retake and resell any of the property sold in case such purchasers, their successors or assigns, should fail to comply with any order of this court in respect of the payment of the receiver's notes or certificates or other prior indebtedness, obligations or liabilities, as provided in said decree or in respect of any other of the terms or conditions of the said sale, or of this decree, within thirty days after the service of a copy of such order.

And it further appearing as aforesaid, that the said purchasers offer to turn in to be canceled, the said receiver's notes or certificates held or controlled by them and offer to turn in to be credited on

account of the purchase price bid, as provided in said decree of foreclosure and sale, the said bonds of said Atlantic and Pacific Railroad Company secured by its said Western Division first mortgage, together with the unpaid coupons for interest thereon, which bonds, together with the $500,000 of such bonds deposited at the time of the sale, are all the outstanding bonds secured by said mortgage; and the said purchasers being willing to accept a conveyance of said railroad, property, rights, privileges and franchises subject to
86 the payment by such purchasers, their successors or assigns, in addition to the purchase-money bid, of such further sums in cash as may be required to pay all unpaid costs of this cause, and all proper expenses attendant upon said sale, including the compensation of the special master, and all unpaid charges, compensations, allowances and disbursements of the complainant United States Trust Company of New York, as trustee, and its solicitors and counsel, and of the receiver and of his solicitors and counsel, and also all such other proper allowances, compensations and disbursements of the parties or their counsel as the court shall order, and also any unpaid balance of receiver's notes or certificates duly issued by the receiver herein and other indebtedness and obligations lawfully incurred by the said receivers, together with interest accrued thereon to the date of payment.

Now, therefore, it is further ordered and decreed that upon delivery to said special master of the said receiver's notes or certificates tendered by said purchasers, the same being stamped or endorsed substantially as follows: "Surrendered for cancellation by the purchasers of the Western division of the Atlantic and Pacific Railroad Company at the foreclosure sale thereof," and upon delivery to said special master of the said additional Western Division first-mortgage bonds above mentioned to the amount of $15,500,000 principal, or a certificate of the Union Trust Company of New York that there have been deposited with it subject to the order of this court the said additional Western Division first-mortgage bonds above mentioned, the said special master be, and he hereby is, authorized and
87 directed to sign, seal, execute, acknowledge and deliver a deed or deeds of conveyance and assignment to such purchasers, their successors and assigns of all and singular the railroad, property, rights, privileges and franchises in and by said decree directed to be sold; the same being described as follows, viz:

The franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies and all other property of every description composing and pertaining to that part of the railroad and telegraph line of the Atlantic and Pacific Railroad Company known as the Western division thereof, beginning at Albuquerque on the Rio Grande river, in the Territory of New Mexico, and thence running westwardly through the Territory of Arizona to the head-waters of the Colorado Chiquito and thence to the Colorado river and across the same to a point at or near the town of The Needles, in the State of California, and thence as the said line has been or may be located or constructed to the Pacific ocean; and also all additions and ex-

tensions to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, interest, property possession, claim and demand whatsoever both in law and in equity of said Atlantic and Pacific Railroad Company of, in and to the same and any and every part thereof, with the appurtenances, including all the real estate, lands and land grants, whether patented or unpatented or surveyed or unsurveyed or otherwise in the Territories of New Mexico
88 and Arizona and State of California, west of said Rio Grande river, or pertaining to said Western division, at Albuquerque or elsewhere, in which said Atlantic and Pacific Railroad Company or said United States Trust Company of New York, trustee, has any interest, and all interests therein and rights thereto, and also all tracks, lines, rails, bridges, ways, buildings, piers, wharves, structures, erections, fences, walls and fixtures erected on, or pertaining to, said Western division as now constructed and operated, and all franchises, privileges and rights of said railroad company, and also all the locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured or unmanufactured materials, coal, wood and supplies of every kind belonging or pertaining to said Western division; and also all choses in action of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and account of every kind and description, all papers, maps, inventories and documents in anywise referring or relating to said property and the franchises; and also all franchises and property and all personal rights or interest in franchises or property of every kind and description, real or mixed, west of said Rio Grande river, or relating or pertaining to said Western division, wheresoever the same may be situated, held or owned by the defendant railroad company or in which said company has any interest; including also any property and income acquired or received by the receiver in the management or operation of the said premises, and all property of said defendant Atlantic and Pacific Railroad Company vested in or standing in the name of the receiver, or to which the receiver
89 has in any manner acquired title as such;

Subject, however, to the express condition that the purchasers, and their successors or assigns, as part consideration and purchase price of the property purchased, and in addition to the sum bid, shall take the same and receive the deed therefor upon the express condition that they or their successors or assigns shall pay, satisfy, and discharge any unpaid compensation which shall be allowed by the court to the receiver, and any unpaid indebtedness, obligations or liabilities which shall have been legally contracted or incurred by the receiver before delivery of possession of the property sold, including the receiver's notes or certificates mentioned in said decrees with interest thereon to the date of payment, including also any taxes which may finally be adjudged to be a lien upon the property sold under the decree aforesaid; and also any unpaid in-

debtedness or liabilities contracted or incurred by said defendant railroad company in the operation of its railroad prior to the appointment of receivers, which are prior in lien to the first mortgage of said defendant railroad company mentioned in said decrees and which shall not be paid or satisfied out of the income of the property in the hands of the receiver, upon the court adjudging the same to be prior in lien to said mortgage and directing payment thereof, provided that suit be brought for the enforcement of such indebtedness, obligations or liability within the period allowed by any statute of limitations applicable thereto; all payments for any such purpose made by the purchaser in advance of the final accounting and discharge of the receiver to be treated as advances and subject to final adjustment upon such accounting.

90 Provided, however, that upon publication by the receiver, as provided in said decree, upon the request of the purchasers after delivery of possession of the property, of a notice requiring holders of any such claims to present the same for allowance, any such claim which shall not be so presented or filed within the period of six months after the first publication of such notice shall not be enforceable against said receiver nor against the property sold nor against the purchasers or their successors or assigns;

And subject also to the payment by such purchasers, their successors or assigns, of such further sums as may be required to pay all the costs of this cause, and all proper expenses attendant upon said sale, including the compensation of the special master, and the payment of all charges, compensations, allowances and disbursements of the complainant United States Trust Company of New York, as trustee, and its solicitors and counsel and of the receiver and his solicitor and counsel and also all such other proper allowances, compensation and disbursements of the parties or their counsel as the court shall order;

And the right is reserved to the court to retake and resell all or any of the premises so conveyed in case the purchasers, their successors or assigns, shall fail to comply with any order of the court in respect to the payment of such prior indebtedness, obligations or liabilities within thirty days after the service of a copy of such order, jurisdiction being reserved in the said cause for that purpose.

It is further ordered, adjudged and decreed that the special master stamp, or cause to be stamped, each of said $16,000,000 of Western Division first-mortgage bonds, to be turned in or deposited by

91 said purchasers, substantially as follows, viz:

"This bond with coupons due January 1, 1894, and subsequent thereto attached, was presented by the purchasers of the Western division of the Atlantic and Pacific Railroad Company and other properties sold under the decree of the district court for the second judicial district of New Mexico and of decrees ancillary thereto, entered by the certain other courts in causes between United States Trust Company of New York, complainant, and Atlantic and Pacific Railroad Company and others, defendants, and there has been

credited as paid on this bond and the coupons for interest thereon the sum of $—.

"OWEN N. MARRON,
"*Special Master.*"

And that such bonds, with the coupons attached, when so stamped, shall be returned to the holders thereof.

It is further ordered, adjudged and decreed, that all said bonds and coupons heretofore deposited by said purchasers, and also all bonds and coupons which hereafter shall be delivered or turned in by the purchasers, their successors or assigns, shall be deposited with the Union Trust Company, of New York, to be by it held subject to the further order of the court herein.

It is further ordered, adjudged and decreed, that the said deed of conveyance shall be substantially in the form of the draft deed of conveyance herewith filed, the same being hereby approved; and, in order to facilitate the recording thereof, five originals of such deed may be executed, acknowledged and delivered by the said special master, all or any one or more of which may be recorded, and each of which when executed, acknowledged and delivered shall
92 be deemed an original, and all collectively but one instrument.

It is further ordered, adjudged and decreed, that upon the request of said purchasers there shall be excepted in said deed, from the property thereby conveyed, such of the leases and contracts sold with the railroad and other property and franchises as such purchasers at or before the delivery of said deed shall elect not to accept or assume, and that the said purchasers, their successors and assigns, shall have the right, within ninety days after the delivery of the deed of conveyance hereunder, to elect whether or not to assume or adopt any other of the leases and contracts sold with the railroad and other property and franchises; and the purchasers, their successors or assigns, shall only be held to have assumed such of said leases or contracts as they or it shall so elect to assume.

It is further ordered, adjudged and decreed that upon the execution of the deed to be executed and delivered by the special master as herein ordered and upon request of the grantees in such deed, the receiver is authorized, directed and required to let the said grantees, their successors and assigns, into possession of the premises conveyed, and the receiver, or any party to this cause having possession thereof, shall deliver any of the premises sold, which may be in their possession, to such grantees, their successors or assigns, together with any property and income acquired or received by the receiver in the management or operation of the mortgaged premises; subject nevertheless, to the condition that the court may retake and resell the property in case the purchasers, their successors or
93 assigns, shall fail to pay any balance of the purchase price unpaid, or to comply with any order of court with respect to the payment of the prior indebtedness, obligations and liabilities, as provided in said decree of foreclosure and sale, within thirty days after the service of a copy of such order.

It is further ordered, adjudged and decreed, that the defendant The Atlantic and Pacific Railroad Company, at the time of the execution of said deed or deeds by said special master and as a further assurance to the purchasers, shall execute its deed, or join with the special master in the execution of the deed or deeds to be made by him, and shall thereby convey and release to the purchasers, their successors and assigns the property and franchises conveyed to such purchasers by said special master or covered by said Western Division first mortgage and all its right, title and interest therein or thereto; and the said complainant The United States Trust Company of New York, as trustee under said Western Division first mortgage shall likewise at the time of the execution of such deed or deeds of said special master transfer and release to such purchasers, their successors and assigns, all its right, title and interest, under the said Western Division first mortgage, in or to the said property and franchises; and, further, that the receiver at the time of the delivery of said deed or deeds by the special master shall make, execute and deliver to such purchasers, their successors and assigns, good and sufficient deed or deeds, conveying any and all property of the defendant railroad company vested in or standing in the name of said receiver, or to which said receiver has in any manner acquired title as such.

94 Jurisdiction of this cause is retained by this court for the purpose of enforcing the provisions of this decree and the terms and conditions of the conveyance of said property and premises; and full power is reserved to the court, notwithstanding such conveyance and delivery of possession, to retake and resell the said property and premises conveyed, if said purchasers, their successors or assigns, shall fail or neglect fully to complete such purchase and comply with all the terms, conditions and provisions of said decree of foreclosure and sale and of this decree, and shall fail to comply with any order of the court in respect to the payment of such prior indebtedness, obligations or liabilities.

N. C. COLLIER, *Judge.*

And thereafter, on to wit: the 10th day of June, A. D. 1897, there was filed in the office of the clerk of the said court, in said cause, an intervening petition of the Territory of New Mexico, as to Valencia County taxes for 1896, which said petition is in the words and figures following to wit:

In the District Court, Second Judicial District, Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY ET AL.

To the Hon. Needham C. Collier, associate justice of the supreme court of said Territory and judge of said district court:

Your petitioner, The Territory of New Mexico, respectfully shows to your honor the following:

1. Certain property of the Atlantic and Pacific Railroad Company was omitted in the assessment of taxable property within the
95 county of Valencia in the Territory of New Mexico for a series of years beginning with the year 1892 and ending with the year 1896, and was not put upon the assessor's books for said years, and the assessor in said county having failed to list the same or place it upon his roll before it was returned to the county commissioners, the collector of taxes in said county, after the tax-list for the year 1896 had been delivered to him, proceeded to list, value and assess such property in the manner that the assessor might have done, and to enter such assessment in his tax-list and to assess taxes thereon as hereinafter in detail more fully set forth.

2. The said collector, for the year 1892, entered upon his tax-list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof from which it appears that the total valuation of said property amounted to $620,390. The tax regularly levied by the proper authorities upon all property within said county for the year 1892, for territorial and county purposes, was at the rate of twenty-one and nine-tenths mills, so that the amount of tax upon the valuation aforesaid amounts to $13,586.54, one-half of which became delinquent upon the first day of January, 1893, and the other half on the first day of July, 1893, said halves bearing interest respectively, from said respective dates at the rate of twenty-five per centum per annum.

3. The said collector, for the year 1893, entered upon his tax-list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof, from which
96 it appears that the total valuation of said property amounted to $620,390. The tax regularly levied by the proper authorities upon all property within said county for the year 1893, for territorial and county purposes, was at the rate of thirty-seven and five-tenths mills, so that the amount of tax upon the valuation aforesaid amounts to $23,064.63, one-half of which became delinquent upon the first day of January, 1894, and the other half on the first day of July, 1894, said halves bearing interest respectively from said respective dates at the rate of twenty-five per centum per annum.

The said collector, for the year 1894, entered upon his tax-list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof, from which it appears that the total valuation of said property amounted to $626,399. The tax regularly levied by the proper authorities upon all property within said county for the year 1894, for territorial and county purposes, was at the rate of thirty-six and seventy-five-hundredths mills, so that the amount of tax upon the valuation aforesaid amounts to $23,020.16, one-half of which became delinquent upon the first day of January, 1895, and the other half on the first day of July, 1895,

said halves bearing interest respectively from said respective dates at the rate of twenty-five per centum per annum.

The said collector, for the year 1895, entered upon his tax-list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof, from which it appears
97 that the total valuation of said property amounted to $626,399. The tax regularly levied by the proper authorities upon all property within said county for the year 1895, for territorial and county purposes, was at the rate of thirty-six and seventy-five-hundredths mills, so that the amount of tax upon the valuation aforesaid amounts to $23,020.16, one-half of which became delinquent upon the first day of January, 1896, and the other half on the first day of July, 1896, said halves bearing interest respectively from said respective dates at the rate of twenty-five per centum per annum.

6. The said collector, for the year 1896, entered upon his tax-list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is hereto attached and hereby declared to be a part hereof, from which it appears that the total valuation of said property amounted to $626,399. The tax regularly levied by the proper authorities upon all property within said county for the year 1896, for territorial and county purposes, was at the rate of thirty-eight and seventy-five-hundredths mills, so that the amount of tax upon the valuation aforesaid amounts to $24,272.96, one-half of which became delinquent upon the first day of January, 1897, and bears interest from that date at the rate of twenty-five per centum per annum; and the other half will become delinquent on the first day of July, 1897, and will thereafter bear interest at said rate of twenty-five per centum per annum.

7. The receiver of the property of the said railroad company, heretofore appointed in this cause refuses to pay the said taxes or any part thereof and disputes the validity of the same upon the ground that all of the property so listed, valued and assessed
98 as aforesaid is exempt from taxation by virtue of the provision contained in the second section of an act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," which became a law on the 27th day of July, 1866; but your petitioner charges that the said exemption from taxation extends only to the right of way granted to said railroad company on each side of its railroad, where it may pass through the public domain, and does not extend to any improvements made upon the said right of way, nor to the said right of way itself -here it passes through land not included in the public domain.

Your petitioner therefore prays that the said taxes so levied as aforesaid may be declared by decree of this court to be a lien upon said property of said railroad company, now in the hands of the said receiver, and that the said receiver may be ordered and directed to pay the said taxes, together with the interest thereon, to the collector of taxes in and for said county of Valencia, and that your peti-

tioner may have such other and further relief as equity may require and to your honor shall seem meet.

F. W. CLANCY,
Solicitor for Petitioner.

Additional Assessment for the Year Eighteen Hundred and Ninety-two.

The following was omitted in the assessment of the year 1892 and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

99	The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile	$214,500
	Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile	$394,550
	Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station	1,800
	Station-houses, depots, switches, water tanks, and all other improvements at San Jose station	540
	Station-houses, depots, switches, water tanks, and all other improvements at El Rito station	600
	Station-houses, depots, switches, water tanks, and all other improvements at Laguna station	2,100
	Station-houses, depots, switches, water tanks, and all other improvements at Cubero station	600
100	Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station	1,300
	Station-houses, depots, switches, water tanks, and all other improvements at Grant's station	3,100
	Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station	1,300
		$11,340

Additional Assessment for the Year Eighteen Hundred and Ninety-three.

The following was omitted in the assessment of the year 1893, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile..... $214,500

Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county
101 of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile..... $394,550

Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station..... $1,800

Station-houses, depots, switches, water tanks, and all other improvements at San Jose station..... 540

Station-houses, depots, switches, water tanks, and all other improvements at El Rito station..... 600

Station-houses, depots, switches, water tanks, and all other improvements at Laguna station..... 2,100

Station-houses, depots, switches, water tanks, and all other improvements at Cubero station..... 600

Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station..... 1,300

Station-houses, depots, switches, water tanks, and all other improvements at Grant's station..... 3,100

Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station..... 1,300

$11,340

102 *Additional Assessment for the Year Eighteen Hundred and Ninety-four.*

The following was omitted in the assessment of the year 1894, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of

Valencia and constituting "improvements" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile..... $214,500

Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile..... $394,550

Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station..... $2,289

Station-houses, depots, switches, water tanks, and all other improvements at San Jose station..... 541

103 Station-houses, depots, switches, water tanks, and all other improvements at El Rito station..... 842

Station-houses, depots, switches, water tanks, and all other improvements at Laguna station..... 4,025

Station-houses, depots, switches, water tanks, and all other improvements at Cubero station..... 700

Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station..... 1,045

Station-houses, depots, switches, water tanks, and all other improvements at Grant's station..... 3,150

Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station..... 4,757

$17,349

Additional Assessment for the Year Eighteen Hundred and Ninety-five.

The following was omitted in the assessment of the year 1895, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land
104 embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile..... $214,550

Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvements" upon the land em-

braced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile $394,550
Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station..... $2,289
Station-houses, depots, switches, water tanks, and all other improvements at San Jose station..... 541
Station-houses, depots, switches, water tanks, and all other improvements at El Rito station..... 842
Station-houses, depots, switches, water tanks, and all other improvements at Laguna station..... 4,025
Station-houses, depots, switches, water tanks, and all other improvements at Cubero station..... 700
Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station..... 1,045
105 Station-houses, depots, switches, water tanks, and all other improvements at Grant's station..... 3,150
Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station..... 4,757

$17,349

Additional Assessment for the Year Eighteen Hundred and Ninety-six.

The following was omitted in the assessment of the year 1896, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph lines, and other structures, erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile..... $214,500
Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph lines, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles,
106 valued at $6,500 per mile..... $394,550
Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station..... .... $2,289
Station-houses, depots, switches, water tanks, and all other improvements at San Jose station..... 541

Station-houses, depots, switches, water tanks, and all other improvements at El Rito station	842
Station-houses, depots, switches, water tanks, and all other improvements at Laguna station	4,025
Station-houses, depots, switches, water tanks, and all other improvements at Cubero station	700
Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station	1,045
Station-houses, depots, switches, water tanks, and all other improvements at Grant's station	3,150
Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station	4,757
	$17,349

And thereafter, on, to wit: the 10th day of June, A. D. 1897, there was duly made and entered of record, the same being in vacation, an order as to intervention of Territory of New Mexico *in re* Valencia County taxes which said order is in the words and figures following, that is to say:

In the District Court, Second Judicial District, Territory of New Mexico.

107 UNITED STATES TRUST COMPANY OF NEW YORK
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY ET AL.

Upon reading and filing the intervening petition of the Territory of New Mexico, and after hearing F. W. Clancy, Esq., solicitor for said intervening petitioner, it is ordered by the court that the said Territory of New Mexico be and hereby is given leave to intervene herein and that the parties hereto who have appeared herein are required to show cause before the judge of this court at the court-house, in the county of Bernalillo, on the 15th day of June, 1897, at ten o'clock in the forenoon of said day, why the prayer of said petitioner should not be granted, service of copies of said petition and of this order to be made not later than the 10th day of June, 1897, upon the solicitor for complainant, the solicitor for the Mercantile Trust Company and the solicitor for the said receiver, such service to be made in accordance with the usual practice of this court.

N. C. COLLIER, *Judge.*

And thereafter, on to wit, the 23rd day of June, A. D. 1897, there was filed in the office of the clerk of the said court in this cause, joint and several pleas of United States Trust Company and C. W. Smith, receiver A. & P. R. R. Co., which said pleas are in the words and figures following, to wit:

TERRITORY OF NEW MEXICO:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting to Hear and Determine Causes Arising
108 under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Plaintiff,
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY ET AL.

In the matter of the intervening petition of the Territory of New Mexico filed in this cause.

The joint and several pleas of the United States Trust Company and C. W. Smith, receiver of the Atlantic and Pacific Railroad Company, appointed by this court in the above-entitled cause, to the intervening petition of the Territory of New Mexico for the collection of taxes alleged to be due in Valencia county.

First Plea.

The United States Trust Company, complainant herein, and C. W. Smith, the receiver of the property of the Atlantic and Pacific Railroad Company, by protestation, not confessing or acknowledging all or any part of the matters and things in the intervening petition of the Territory of New Mexico to be true, in such manner and form as the same are therein set forth and alleged, do plead thereto in relation to the amount of taxes alleged to have been levied or assessed for a series of years commencing with the year A. D. 1892, and ending with the year 1896, against the Atlantic and Pacific Railroad Company, or its property, and particularly in relation to the amount of taxes alleged to have been levied and assessed for the year 1892, against said company or its property in the sum of $13,586.54, the following facts in bar thereof, and in bar of the right of the Territory of New Mexico to receive or collect any amount of the taxes mentioned or described in said intervening petition for any of the years mentioned therein, and particularly said sum of $13,586.54, or any part thereof, taxes so alleged to have been levied and assessed for the year 1892, as aforesaid.

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That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27, 1866, and that under and by virtue of said act and prior to the year 1885, the Atlantic and Pacific Railroad Company constructed and built, and has ever since maintained in the county of Valencia, Territory of New Mexico, 93.458 miles of main line of railroad track upon the right of way granted to it under said act of Congress, over and through lands that at that time belonged to the Government of the United States, and over and upon a right of way through lands in said county belonging to private individuals or corporations or associations, which said right of way was and is of he extent of 200 feet in width under and by virtue of said act of

Congress, both through the lands belonging to the United States, as well as through the lands belonging to others.

That about 58 miles of said right of way in said county and Territory was and is through land which was not Government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress. That the balance of said right of way was and is over and upon public lands of the United States. That in addition to the main track built upon said right of way, the railroad company built and has maintained on said right — way through Valencia county, in said Territory, 3.433 miles of sidings, making a total amount of trackage in Valencia
110 county in said Territory in the year 1892 of 96.891 miles; all of which was upon the right of way granted to and acquired by the Atlantic and Pacific Railroad Company under said act of Congress. That in addition to said trackage, the Atlantic and Pacific Railroad Company in 1892 had in Valencia county, in said Territory, upon its right of way and as a part thereof, station grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, which were, have been and are now stations upon said line of railroad in said county and Territory, named as follows:

Rio Puerco, San Jose, El Rito, Laguna, Cubero, McCarty's, Grant's and Bluewater.

That upon said right of way and station grounds, prior to 1892, and up to January 4, 1893, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon, bridges and culverts of iron, stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its tracks and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly imbedded in this grade which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so embedded in said grade so that the
111 same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains, thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side track; and that the buildings at the stations above described, are such as were and are necessary for the operation of the said railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

That in the year 1892 the Atlantic and Pacific Railroad Company had in said county and Territory, in addition to the property hereinabove described, a large amount of land, which it then claimed

belonged to it as a part of the lands granted to it by said act of Congress, and it also had some personal property subject to taxation therein.

That on and after the first day of March, 1892, and within the time required by law, one, A. M. Bergere, the then duly qualified and acting assessor of Valencia county, Territory of New Mexico, for the year A. D. 1892, pretended and claimed to assess, and to enter upon the assessment-roll for said county and Territory, for said year, the assessment of all the property of the Atlantic and Pacific Railroad Company in Valencia county, in said Territory, subject to taxation, and for the purpose of making such assessment in conformity with the requirements of law, made and entered upon the assessment-roll, for said year, in said county, certain entries relative to the Atlantic and Pacific Railroad Company and its property, both real and personal; a true, perfect, correct and complete copy
112 of said assessment-roll, in so far as it shows any entries for the year 1892, of or concerning the Atlantic and Pacific Railroad Company, or its property, is filed herewith, marked "Receiver's Exhibit No. 1," and the same by reference thereto is made a part of this plea.

That thereupon the said county assessor, upon a leaf in the assessment-roll opposite to the leaf in said roll containing the assessment of the Atlantic and Pacific railroad, and its property, as shown by Receiver's Exhibit No. 1, entered and extended the various levies of taxes for said county for said year 1892, against said property and each item thereof; a full, true and complete copy of the taxes levied against the Atlantic and Pacific Railroad Company and its property, and each item thereof, in said county, by said assessor, for said year A. D. 1892, as extended by him upon the page of said assessment-roll opposite the page containing the assessment itself, is shown by the paper herewith filed, marked "Receiver's Exhibit No. 2," and by reference thereto is made a part hereof.

That on the 5th day of September, 1892, the board of county commissioners of Valencia county, Territory of New Mexico, endorsed on the back of the assessment and tax roll so made by said assessor, as aforesaid their approval and warrant to the collector, a true and correct copy of which is shown on the back of the paper marked "Receiver's Exhibit No. 2," and to which reference is hereby made.

That on the 5th day of September, A. D. 1892, the said assessor duly verified his assessment and tax roll, a true copy of which verification is shown endorsed on the back of the paper marked "Receiver's Exhibit No. 2," and made a part hereof by reference
113 thereto.

That on the 5th day of September, A. D. 1892, one Tranquilino Luna, now deceased, and who was then sheriff and *ex officio* collector of taxes for said county, endorsed upon the copy of the assessment-roll and tax-roll on that day delivered to him by the assessor a receipt, a copy of which is shown by the endorsement on the back of the paper marked "Receiver's Exhibit No. 2," and made a part hereof by reference thereto.

That the assessor in the year 1892, in accordance with law, made three assessment-rolls which contained the assessment of the property both real and personal, of Valencia county, in said Territory, for that year, with the taxes levied and extended thereon against each item of property assessed, in the manner shown by Receiver's Exhibits 1 and 2, and one of said assessment-rolls was delivered to the territorial auditor, and one of said assessment-rolls was retained in the office of said assessor, and the other of said assessment-rolls was delivered to the said Tranquilino Luna, sheriff and *ex officio* tax collector as aforesaid.

That Receiver's Exhibits Nos. 1 and 2 filed herewith are copies of that portion of the assessment and tax roll delivered by the assessor of said county to the said late Tranquilino Luna, as said sheriff and *ex officio* tax collector, and which in anywise described any property belonging to the Atlantic and Pacific Railroad Company, or against which any tax was extended or levied for the year A. D. 1892, and such exhibits show exactly everything that was done in that year in the way of assessing the property of said railroad com-
114 pany, and of levying or extending a tax against the same, as the same appears upon the original assessment-roll.

That on or about the — day of ——, 1892, the Atlantic and Pacific Railroad Company paid to the said late Tranquilino Luna as sheriff and *ex officio* collector of taxes, the sum of $43.90, being the amount of tax levied upon the personal property of the Atlantic and Pacific Railroad Company, which was assessed upon said assessment-roll in the hands of said Luna in the column therein headed "Value of cattle" in the sum of $2,004.90, as will appear from said Receiver's Exhibit No. 1.

That there was no personal property of any kind, nature or description belonging to the said railroad company in Valencia county, which was subject to taxation in that county for the year A. D. 1892, which was not included in the assessment of $2,004.99 aforesaid, and upon which the said tax of $43.90 was levied and paid; and that during said year, the railroad company neither had, owned, or had in its possession or under its control, any cattle in Valencia county, or any cattle subject to taxation in that county.

That on or about the — day of ——, 1892, the Atlantic and Pacific Railroad Company paid to the late Tranquilino Luna, as sheriff and *ex officio* collector of Valencia county, the further sum of $1,045.74, being the tax levied against that portion of its land grant which was and is situated in Valencia county in said Territory, and which, upon said assessment-roll, under the head of "Value of lands," was assessed at the sum of $31,529.61, as appears by reference to said Receiver's Exhibit No. 1; true and correct copies of the receipts
115 given by the said Tranquilino Luna are filed with this plea, marked Receiver's Exhibits 3 and 4, reference to which is hereby made and the same made a part of this plea.

That no other or further assessment was ever made by any officer of Valencia county in said Territory in the year 1892, of any property belonging to the Atlantic and Pacific Railroad Company other than that shown by Receiver's Exhibit No. 1, and no other or further

levy or extension of taxes against such assessment was ever made during said year, for said year or any other year, save and except that shown by Receiver's Exhibit No. 2.

That the entire rate of taxation in Valencia county for the year 1892, including each, all and every tax authorized to be levied, was and is the sum of $2.19 on each $100 of assessed valuation.

That the assessment and tax rolls of said county and Territory for said year, retained by said assessor, and the one sent to the territorial auditor, are substantially duplicates of the one delivered to the said Tranquilino Luna.

That in the year 1892 the officers having charge of such matters for the Atlantic and Pacific Railroad Company, made a return to the county assessor of said county of the property of said railroad company situated in said county and Territory, and the return so made of the property is shown by Receiver's Exhibit No. 11, which is a true copy, and which by reference thereto is made a part hereof.

That the other property returned by the taxing officers of said railroad company for said year, was and is the property upon which the taxes are paid as above stated, and as shown by Receiver's Exhibits 3 and 4.

116 That the only pretended or claimed levy of taxes against any property of the Atlantic and Pacific Railroad Company for the said year, remaining unpaid, is that shown to have been extended and levied upon the "right of way" of the Atlantic and Pacific Railroad Company which was and is assessed at the lump sum of $327,103, upon the assessment-roll for said year, together with the further sums placed in said assessment-roll in the column headed "Value of cattle," opposite the words contained in the column in said assessment-roll headed "Name of property-owner," save and except as hereinafter stated.

The names and sums referred to are as follows:

Rio Puerco, 1st	$1,888 00
El Rito, 3rd	541 00
Laguna, 4th	677 00
Cubero, 6th	2,145 00
McCarty's, 7th	682 00
Grant's, 8th	1,383 00
Bluewater, 9th	3,150 00
San Jose, 2nd	1,316 00

All of which is shown by the said assessment and levy of taxes upon said assessment-roll, as will fully appear by reference to said Receiver's Exhibits No. 1 and No. 2, and the endorsements thereon.

That prior to the first day of January, 1894, the Atlantic and Pacific Railroad Company paid each and every item of taxes assessed and levied against it or its property in said Valencia county, Territory of New Mexico, save and except only that levied against the assessed value of its "right of way," and that levied against the figures set opposite the names of the stations as hereinabove set forth and described.

117 That subsequently and on the fourth day of June, 1894, in an action of foreclosure pending in this court, wherein The Mercantile Trust Company was plaintiff and The Atlantic and Pacific Railroad Company was defendant, and in which receivers, who were the predecessors in office of the said C. W. Smith, receiver herein, had been duly appointed, one Solomon Luna, who was then and at that time the duly appointed, acting and qualified collector of said county of Valencia, made and filed a petition in this court, in said cause, with permission of this court, and of which the following is a true and correct copy:

TERRITORY OF NEW MEXICO, *County of Bernalillo,* } ss:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting to Hear and Determine Causes Arising under the Constitution and Laws of the United States.

THE MERCANTILE TRUST COMPANY, Complainant,
vs.
ATLANTIC AND PACIFIC RAILROAD CO., Defendant.

To the Hon. Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof, in chancery sitting:

Petition of Solomon Luna.

Your petitioner, Solomon Luna, sheriff and *ex officio* collector of taxes and licenses for the county of Valencia in the Territory of New Mexico, respectfully shows unto your honor that in accordance with the laws of the Territory of New Mexico in such cases made and provided the taxing office of the county of Valencia aforesaid, did levy and assess the property of the defendant, The Atlantic and Pacific Railroad Company, situated and being in said county,
118 taxes for territorial and county purposes for the year 1892, amounting to the sum of $8,501.24.

Your petitioner further shows unto your honor that in like manner, a tax amounting to the sum of $14,706.16 was levied and assessed upon the property of the Atlantic and Pacific Railroad Company for the year 1893.

Your petitioner further shows unto your honor that at the times prescribed by law in each of the said years, 1892 and 1893, the tax-roll for the county of Valencia aforesaid, duly certified as required by law, was placed in the hands of your petitioner and your petitioner thereby became charged with the duty of collecting from the said Atlantic and Pacific Railroad Company the taxes so levied and assessed against it, and your petitioner is advised by counsel and believes and therefore charges the fact to be, that the levy and assessment of the said taxes created a lien upon all the property of the said defendant, The Atlantic and Pacific Railroad Company within the county of Valencia aforesaid, prior and superior to all

other liens and incumbrances; which lien it was the duty of your petitioner to enforce by seizure of the property of the said defendant, The Atlantic and Pacific Railroad Company, and sale thereof or sufficient amount thereof to satisfy the said taxes, together with interest and penalties which have accrued thereon.

Your petitioner further shows unto your honor that heretofore, to wit: on the — day of April, 189–, your petitioner being then and there about to proceed to the enforcement of the payment of the said taxes so levied and assessed against the said defendant,
119 The Atlantic and Pacific Railroad Company, the said defendant filed in this honorable court its bill of complaint, seeking to enjoin your petitioner from so enforcing the payment of said taxes, and while the said bill of complaint was pending and undetermined in this honorable court, and before your petitioner was able to proceed in the manner prescribed by law to the enforcement of the payment of said taxes, this proceeding by the Mercantile Trust Company was begun in this honorable court, and J. W. Reinhart, John J. McCook and Joseph C. Wilson were on the 5th day of January, 1894, appointed by this honorable court, receivers therein, and under and by virtue of such appointment took possession of all of the property of said defendant; and now control and operate the same as such receivers under the orders of this honorable court.

Your petitioner further shows unto your honor that he is advised by counsel and believes and therefore charges the fact to be, that by reason of the appointment of the said receivers in this proceeding, your petitioner is prevented from proceeding in the manner prescribed by law to enforce the collection of the said taxes so levied and assessed against the said defendant, The Atlantic and Pacific Railroad Company, but your petitioner is likewise advised that it is the duty of the said receivers to pay the said taxes out of any moneys in their hands belonging to the said defendant, but nevertheless, the said receivers deny their liability to pay the said taxes so levied and assessed, and have refused and still refuse to pay the same, although thereunto requested by your petitioner.

Your petitioner further shows unto your honor that it is
120 impracticable to file with this petition, a copy of the tax-rolls of the county of Valencia, but your petitioner files herewith extracts therefrom showing the levy and assessment of said taxes against the defendant, The Atlantic and Pacific Railroad Company, and now here offers to produce when and where this honorable court shall direct, the original tax-rolls for the inspection of the said receivers if thereunto required.

Your petitioner shows unto your honor that it is the manifest duty of the said receivers to pay the said taxes so levied and assessed for the years 1892 and 1893, but inasmuch as the said receivers refuse to pay the same, your petitioner is without remedy except in this proceeding.

Wherefore, your petitioner prays that the said receivers may be ordered to pay to your petitioner, all unpaid taxes levied and assessed against the Atlantic and Pacific Railroad Company for the

years 1892 and 1893, and that your petitioner may have such other and further relief in the premises as equity may require and to your honor may seem meet.

(Signed) SOLOMON LUNA,
Sheriff and ex Officio Collector of Taxes and Licenses, Valencia County, N. M.

(Signed) NEILL B. FIELD,
Solicitor for Petitioner.

TERRITORY OF NEW MEXICO, *County of Bernalillo,* } ss:

Solomon Luna being first duly sworn, upon his oath deposes and says: That he has read the foregoing petition and knows the contents thereof; that the allegations therein are true of his own knowledge, except as to so much and such parts thereof as are made
121 upon information and belief; and as to those allegations he believes the same to be true.

(Signed) SOLOMON LUNA.

Subscribed and sworn to before me this 2d day of June, A. D. 1894.

[SEAL.] (Signed) S. BURKHART,
Notary Public.

Filed in my office this 4th day of June, 1894.

O. N. MARRON, *Clerk.*

	Name of property-owner.	Precinct No.	Fraction or other description.	Section.	T-wnship.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.	Addition.	Value of land.	Value of im-pr-vements.	Total val. of land & im-pr-vements.	Value of cattle.	Value of personal property.	Deducti-ns.
1	Atlantic & Pacific R. R. Company.																	
2	Granted lands as per list on file						157,648 04	.20					$31,529 61		$31,529 61		$2,004 99	
3	Personal property as follows:																	
4	Rio Puerco, 1st																1,888 00	
5	El Rito, 2nd																541 00	
6	Laguna																677 00	
7	Cubero																2,145 00	
8	McCarty's																682 00	
9	Grant's																1,383 60	
10	Bluewater																3,150 00	
11	San Jose																1,316 00	
12	Total value of right of way														327,103 00			

1893.

13	Atlantic & Pacific R. R. Company.																	
14	Granted lands as per list on file						169,167 48	.20					33,833 50				2,004 99	Raised by Co. com'issionr's. $16,916 75
15			Rio Puerco station										1,888 00					
16			San Jose										541 00					
17			El Rito										677 00					
18			Laguna										2,145 00					
19			Cubero										682 00					
20			McCarty's										1,383 00					
21			Grant's										3,150 00					
22			Bluewater										1,316 00					
23			Total value of right of way												327,103 00			Final assese'd value. $391,640 24
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| | | Territorial taxes. | | | | | | | | | | County tax. | | | | | | | | | | City tax. | | | | | | | | | |

124 That thereafterwards and on or about the 14th day of December, A. D. 1894, the said Solomon Luna filed in said cause his amended petition, a true and correct copy of which is as follows:

TERRITORY OF NEW MEXICO, *County of Bernalillo,* } ss:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting to Hear and Determine Causes Arising under the Constitution and Laws of the United States.

THE MERCANTILE TRUST COMPANY, Complainant,
vs.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY, Defendant.

Amended Petition of Solomon Luna.

To the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof, in chancery sitting:

Solomon Luna, sheriff and *ex officio* collector of taxes and licenses for the county of Valencia, in the Territory of New Mexico, by leave of the court first had and obtained, amends his petition heretofore filed in this cause and reiterating and reaffirming all the allegations of his original petition herein, the said petitioner shows to the court that while it is true that the Atlantic and Pacific Railroad Company, by C. N. Sterry its general attorney, who at that time had charge for said company to look after the assessment and taxation of said company and its property, in the Territory of New Mexico, made and returned to the assessor of Valencia county, Territory of New Mexico, the return set up in the answer of the said receivers herein, a copy of which is attached to and made a part of said answer, marked "Exhibit B,"
125 and while it is also true that there was excepted from the return so made to the said assessor the list of the real estate owned by the Atlantic and Pacific Railroad Company in the county of Valencia, Territory of New Mexico, which consisted entirely of the land granted by the Government of the United States to the Atlantic and Pacific Railroad Company, outside of its right of way in said county and Territory; it is also true that within what is described in the said "Exhibit B," as the right of way of the said Atlantic and Pacific Railroad Company, in the county of Valencia, the said company is the owner in fee-simple of a tract of land about 200 feet wide and about 60 miles long, that is to say; that your petitioner is informed and believes that the entire length of the main line of the Atlantic and Pacific Railroad Company in the county of Valencia is 95.458 miles, and that as to about 33 miles of said length and no more, the lands covered by the said railroad in the said county of Valencia, in said Territory of New Mexico were part of the public domain at the time of the passage of the act incorporating the said railroad company, and as to all of the lands covered by the said railroad, except

the said 33 miles, the same and every part thereof was held in private ownership at the time of the passage of the said act incorporating the said Atlantic and Pacific Railroad Company; and your petitioner is informed and believes that the said Atlantic and Pacific Railroad Company acquired title thereto by gift, purchase or adverse possession under the provision of section 7, of the said act of incorporation, which title your petitioner is informed and believes is and
126 was at the time of the assessment and taxation thereof, an absolute fee-simple title, and the same and all improvements, thereon, are and were at said time, real estate, and subject to taxation as such in the Territory of New Mexico, and that no part thereof was or is exempt from such taxation.

Your petitioner is advised by counsel and believes, and therefore charges the fact to be, that as to so much of the said track of the said Atlantic and Pacific Railroad Company as traversed and crossed what was part of the public domain of the United States, the said Atlantic and Pacific Railroad Company acquired by section 2, of the said act of incorporation, an easement therein, which by the terms of the said act of incorporation was and is exempt from taxation in the Territory of New Mexico, but your petitioner is advised by counsel and believes, and therefore charges the fact to be, that while the said easement so acquired by virtue of the said grant was exempt from taxation in the Territory of New Mexico, the improvements and betterments thereof were and are no part of the said easement, and were not and are not exempt from taxation by the said provision of the said act of incorporation.

Your petitioner is further advised by counsel, and believes and so charges the fact to be, that by the laws of the Territory of New Mexico, the improvements of the said Atlantic and Pacific Railroad Company upon that portion of the public domain over and upon which the said easement was so acquired, are and were subject to taxation in the Territory of New Mexico, and your petitioner charges that the taxes levied and assessed upon the property of the said Atlantic and Pacific Railroad Company, in the county of Valencia, Territory of New Mexico, which your petitioner seeks to have
127 paid in this proceeding, were and are levied upon and assessed against the said property so subject to taxation as aforesaid, and the same were not nor was any part thereof levied or attempted to be assessed against the said easement of the said company which was so exempt by the said terms of the said act of Congress.

Your petitioner further shows unto your honor that the said taxing officers of the said county of Valencia, in the Territory of New Mexico, accepted a description of the said property, and the valuation thereof as fixed by the agents of the said Atlantic and Pacific Railroad Company, although the said description might have been made more definite and certain, and the said valuation was below the actual value of the said property of the said Atlantic and Pacific Railroad Company for the purposes of taxation, and your petitioner is advised that the said Atlantic and Pacific Railroad Company and these receivers are estopped to deny the sufficiency of the said description or the fairness of the said valuation; and that your peti-

tioner is informed and believes and so charges the fact to be that the value of the road-bed of the said Atlantic and Pacific Railroad Company in the said county of Valencia, to which the company owns a fee-simple title, together with the value of the cuts and fills thereon and the cross-ties, rails, fish-plates, bolts and other improvements thereon, and annexed thereto, together with the improvements of a like nature affixed to the soil and used by the said company in connection with the said easement, is of the value, to wit, of not less than one million dollars, and the amount of taxes sought to be collected in this proceeding is much less than the fair and
128 equitable amount of taxes which should be paid by the said Atlantic and Pacific Railroad Company.

Your petitioner is further advised by counsel that under the provision of the laws of New Mexico in such cases made and provided, he is fully authorized and empowered to correct any mere clerical errors in the entries of said assessment upon the tax-rolls of the county of Valencia; and your petitioner hereby offers if required so to do, to correct any such errors as may be pointed out in the said entries, and your petitioner prays as in his original petition, and will ever pray, etc.

SOLOMON LUNA,
Sheriff and ex Officio Collector of Taxes and Licenses, Valencia County, New Mexico.

NEILL B. FIELD,
Solicitor for Petitioner.

TERRITORY OF NEW MEXICO, *County of Bernalillo,* } ss:

Solomon Luna, being first duly sworn, upon his oath deposes and says, that he has read the foregoing amended petition and knows the contents thereof, that the allegations therein contained are true of his own knowledge, except as to so much and such parts thereof as are made upon information and belief, and as to these allegations he believes the same to be true.

SOLOMON LUNA.

Subscribed and sworn to before me this 13th day of December, A. D. 1894.

[SEAL.] FELIX H. LESTER,
Notary Public.

That thereupon the receivers named in said petition filed their certain pleas to said amended complaint, denying the right to recover the taxes so assessed for such year and that said pleas have been set down for argument in said cause, but have not yet
129 been heard or disposed of by the court, and that on the first day of February, A. D. 1896, C. W. Smith, herein was duly appointed successor in office as receiver of the property of the Atlantic and Pacific Railroad Company to the receivers named in said amended petition, and that he, the said C. W. Smith, is now, and

has been, such successor in office in said suit, as well as receiver appointed in the above-entitled cause.

That the said petitions are still pending and undisposed of in this court and involve the taxes sought to be recovered in this action for the years 1892 and 1893, alleged or claimed to be due from the receiver herein and the Atlantic and Pacific Railroad Company, to Valencia county, in the Territory of New Mexico.

That to each of said petitions of the said Solomon Luna, there *was* filed by the predecessors in office to the said C. W. Smith, receiver herein. pleas which are still undisposed of in said cause.

That no further or other assessment was ever made, or attempted to be made by any officer or officers in Valencia county, in the Territory of New Mexico, for the year 1892 than that heretofore set forth and stated until in the year 1896, when the tax collector of Valencia county that year claimed and pretended, after receiving the tax-rolls of said county for 1896, to enter up the assessment stated and set forth in paragraphs 1 and 2 of the intervening petition filed herein.

That all of the taxes levied, as alleged in the 1st and 2nd paragraphs of said intervening petition, and claimed to have been levied by the collector or any other officer in the county of Valencia
130 and Territory of New Mexico for the year 1892, against the property of the Atlantic and Pacific Railroad Company, were and are based upon the assessment on the superstructure placed on the right of way of the Atlantic and Pacific railroad, as hereinbefore stated and set forth, and upon no other assessment whatever, and was and is the same assessment made by the assessor in said county, as hereinbefore stated and set forth, save and except only that the assessment alleged in the 1st and 2nd paragraphs of the intervening petition did not pretend to be made upon the actual right of way, but only upon its superstructure.

All of which said several matters and things hereinabove stated and set forth said United States Trust Company of New York and said C. W. Smith, as such receiver, jointly and severally aver to be true, and they each jointly and severally plead the same to the said intervening bill of complaint in so far as the same seeks to recover for taxes alleged to be due from either the Atlantic and Pacific Railroad Company or C. W. Smith, its receiver, for the year 1892, and they and each of them jointly and severally humbly crave the judgment of this court whether they be compelled to make any other or further answer to the said bill.

C. N. STERRY,
KARL A. SNYDER,
Solicitors and Counsel for Each of the Defendants Joining Herein.

Receiver's Exhibit No. 1.

Assessment-roll for Valencia County, 1892.

	Name of property-owner.	Proc'd'gs No.	Real estate.										Value of land.	Value of improvements.	Total value of land & improvements.	Value of cattle.	Val. of per. property.	Deductions.
			Fraction or other description.	Section.	T'nship.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.	Add'on.						
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22	Atlantic & Pacific R. R. Co.																	
23	Grant'd lands as per list on file						157,648 04	.20					$31,529 61		$31,529 61	$2,004 99		
24	Personal property as follows:																	
25	Rio Puerco, 1st															1,888 00		
26	El Rito, 3d															541 00		
27	Laguna, 4th															677 00		
28	Cubero, 6th															2,145 00		
29	McCarty's, 7th															682 00		
30	Grant's, 8th															1,383 00		
31	Bluewater, 9th															2,150 00		
32	San Jose, 2d															1,316 00		
33	Total value of right of way														327,103 00			
34																		

RECEIVER'S EXHIBIT No. 2.

Territory of New Mexico, for 1892.

	Fixed by assessor.	Fixed by county commissioner.	Fixed by territorial board equalization.	Final assessed value.	Territorial tax.				County tax.								City tax.				Total tax.
					For territorial purposes.	Territorial institutions.	Capitol bonds.	Insane asylum.	School tax.	General tax.	County additional.	Interest, funded debt, '82 and '83.	Sinking-fund bonds, '82 & '83.	Interest funded debt, '85.	Interest funded debt, '89.	Interest, current-expense bonds.	Road and bridge.	Unpaid interest funded debt.	Cattle indemnity.	Total.	
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33	.....	384,184 40	.....	388,184 40	2,323 21	388 18	38 86	19 40	1,164 55	970 46	194 09	590 03	776 37	62 10	861 76	116 46	194 09	661 68	.....	.....	8,501 24
34																					

Dollars, cents, and mill ($ c. m.) marks omitted.

10—160

133 (The following on a printed blank is pasted in the back of the book.)

Oath of Assessor.

I, A. M. Bergere, assessor of the county of Valencia, Territory of New Mexico, do solemnly swear that during the whole time allowed by law to make this assessment, I have made diligent inquiry and examination to ascertain all the property within said county, subject to taxation, and that I have assessed it on the assessment book equally and uniformly to the best of my judgment, information and belief, at its full cash value, and that I have faithfully complied with all the duties imposed upon the assessor by the revenue laws of the Territory, and that I have not imposed any unjust assessment through malice or ill-will, nor allowed any one to escape a just and equal assessment through favor or reward, so help me God.

A. M. BERGERE, *Assessor.*

Sworn to and subscribed before me this 5th day of September, A. D. 1892.

CARLOS BACA,
Clerk of the Board of County Commissioners.

Office of the board of county commissioners, Valencia county.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

At a regular session, held on the 5th day of September, A. D. 1892.

It is ordered by the board of county commissioners of the said county: That the preceding assessment-roll, and each and every assessment therein contained, as originally returned and
134 assessed or as shown therein to have been revised and corrected by the board, be and the same is hereby approved.

And that a tax of 11.25 mills upon each dollar of taxable property for county purposes, and of three mills on the dollar for school purposes, and 7.65 mills for various territorial funds, to wit:

For territorial purposes fixed by the act of the legislative assembly, approved February 26, 1891, 6.50 mills on the dollar; for territorial institutions, act of February 28, 1889, 1 mill on the dollar; for interest on the capitol bonds, .10 mills on the dollar; insane asylum bonds, .05 mills on the dollar. Total levy for all territorial purposes, 7.65 mills on the dollar; cattle indemnity fund $\frac{50}{100}$ mills on the dollar on the appraised value of all cattle; is hereby levied upon all the property therein returned assessed liable to taxation. And it is further ordered that the assessor of the county enter the several said rates of taxes upon the tax-roll for the year 1892, and that upon the delivery of the tax-roll to the county collector, the county clerk shall charge said collector with the aggregate amount of said several taxes as provided by law.

To the sheriff and *ex officio* collector of the county of Valencia, in said Territory, Greeting:

You are hereby commanded, in accordance with the laws of said Territory, in such cases made and provided, to collect all territorial, county, school, city and all other taxes above enumerated and specified, levied on the citizens of said county, and non-resident property-owners whose property may have been assessed in your county, and all taxes assessed upon property within said county as appears from the tax-list of said county for the year 189–, being
135 the foregoing tax-list, and the delinquent tax-lists of said county for previous years, and also that you collect all interest due on delinquent taxes as provided by the laws of said Territory.

In witness hereof we have hereunto set our hands and caused the seal of said board to be hereunto affixed, attested by the clerk of said board, this 5th day of September, A. D. 1892.

SILVESTRE MIRABAL,
Chairman of Board.
NESTOR JARAMILLO,
JUAN JOSE BENAVIDES,
Commissioners.

Attest: CARLOS BACA,
Probate Clerk and ex Officio Clerk of the Board of County Commissioners.

September 5, A. D. 1892.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

Received of A. M. Bergere, assessor of said county, the tax-lists or assessment-rolls of said county for the year 1892, which amounts to $47,005.00, territorial, school and county funds, viz:

For territorial purposes	$13,910 85
" " institutions	2,140 13
" interest on capitol bonds	214 01
Insane asylum bonds	107 00
For school fund	6,420 40
General tax (county)	5,350 32
County additional	1,070 06
Interest on bonds '82 and '83	5,253 00
" " '85	342 42
Interest on bonds '89	4,750 09
136 Interest on current-expense bonds	642 03
Road and bridge fund	1,070 06
Unpaid interest due 1892	3,317 20
Cattle indemnity fund	136 17
Total	$47,005 00

Witness my hand this 5th day of September, A. D. 1892.

TRANQUILINO LUNA,
Sheriff and ex Officio Collector in and for said County.

RECEIVER'S EXHIBIT No. 3.

Duplicate.

Auditor's No., 701; series 2.

Recorded in Nov., 1892.

Atlantic & Pacific Railroad Company (Western division) to Tranquilino Luna, sheriff and *ex officio* collector, Valencia county, N. M., Dr.

1892.

Nov. 1	To amount of taxes claimed to be due and payable to the tax collector of Valencia county, N. M., from the Atlantic and Pacific Railroad Company, for the year 1892, as follows (not including right of way or land grant):		
	Personal property, section tools, etc.....	$315 99	
	Office, telegraph, and station furniture..	1,689 00	
	Total.....	$2,004 99	
	Tax at $2.19	.....	$43 90

Examined by— — —. Correct: — —. Approved: — —.

137 Approved: C. N. STERRY, *General Attorney.* Approved: — —, *Local Auditor.* Approved: — —, *Gen. Mgr.*

Charge to acc't.			
No.	Letter.	Division.	Amount.
		Tax.....	$43 90
Common.....	.....	.....	$43 90

Received Dec. 5, 1892, from Atlantic & Pacific Railroad Company forty-three $\frac{90}{100}$ dollars, in full payment of above account.
(Signed in duplicate.)
SOLOMON LUNA,
Sheriff and ex Officio Collector, Valencia County.

RECEIVER'S EXHIBIT No. 4.

Duplicate.

Paid by check —. No. 1703—9.

Atlantic & Pacific Railroad Company, land department, to Tranquilino Luna, sheriff and *ex officio* collector, Valencia Co., Los Lunas, New Mexico, Dr.

1892.

Nov. 2	To amount of taxes claimed to be due and payable to the tax collector of Valencia county, New Mexico, for the year 1892 from the land department of the Atlantic and Pacific Railroad Company for that portion of its land grant situated in Valencia county, New Mexico, amounting to 157,648.04 acres	.....	$1,045 74

Examined by—
— —.

Approved: — —, *Auditor.* Approved: — —, *Land Commissioner.* Approved: — —.

138

Charge to—	$	Cts.	
Taxes.....	1,045	74	Received Dec. 5, 1892, from Atlantic & Pacific Railroad Company one thousand and forty-five and $\frac{74}{100}$ dollars, in full payment of above account. (Signed in duplicate.) SOLOMON LUNA, *Sheriff and ex Officio Collector, Valencia County.*
Common....	1,045	74	

RECEIVER'S EXHIBIT No. 11.

List of real estate of the Atlantic and Pacific Railroad Company, situate in the county of Valencia and Territory of New Mexico, listed by the said company for the fiscal year 1892, under protest, and with the express understanding that said company by making said list does not in any maner waive its right to exemption from taxation under the act of Congress whereby it was created, and asserts that all of the real estate herewith listed, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, and the structures placed thereon or attached thereto for the purpose of operating and maintaining said road and transacting and carrying on its business, are and were by the second section of said act of Congress, expressly exempted from taxation within the territories of the United States:

The right of way for said railroad, one hundred feet on each side

thereof, commencing at station 249–13, the point where said railroad enters said county of Valencia from the northeast, and at the
139 dividing line between the county of Valencia and the county of Bernalillo on the east, thence in a westerly direction 93.458 miles to the northern boundary line of said county of Valencia, at station 5247, together with all the ties, iron and steel rails, fish-plates, bolts, spikes, grades, cuts, fills, bridges, culverts and other material constituting and composing the road-bed, track and railroad of said company, together with the telegraph line erected upon and constructed over said right of way, $327,103.00.

All necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, together with the fixed and permanent improvements placed thereon and attached thereto for the purpose of operating and maintaining said railroad, to wit:

Rio Puerco	$1,888 00
San Jose	541 00
El Rito	677 00
Laguna (Indian reservation)	2,145 00
Cubero	682 00
McCarty's (Indian reservation)	1,383 00
Grant's	3,150 00
Bluewater	1,316 00
	$11,782 00
Total value of right of way	327,103 00
Grand total	$338,885 00

TERRITORY OF NEW MEXICO, } *ss:*
County of Bernalillo, }

I, C. N. Sterry, do solemnly swear that I am the general attorney of the Atlantic and Pacific Railroad Company, and that, to
140 the best of my knowledge and belief, the above and foregoing contains a full, true and correct statement of all the real estate owned, claimed by, or in the possession or under the control of the Atlantic and Pacific Railroad Company in the county of Valencia, Territory of New Mexico, not already listed; that I am informed that the same and each and every part and parcel thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations, and the structures, buildings and improvements placed thereon for the purpose of operating and maintaining said road and carrying on the business thereof, are, and were by the said act of Congress incorporating said company, exempt from taxation within the county of Valencia.

C. N. STERRY.

Subscribed and sworn to before me this 19th day of April, A. D. 1892.

[SEAL.] KARL A. SNYDER,
Notary Public.

Second Plea.

The United States Trust Company of New York, and C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company for their second plea to the intervening petition filed herein, by protestation, not confessing or acknowledging all or any part of the matters and things in said intervening petition mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto in relation to the amount of taxes alleged to have been levied and assessed for the year 1893 against the At-
141 lantic and Pacific Railroad Company in the sum of $23,064.63, the following facts in bar thereto, and in bar to the right of the Territory of New Mexico to receive and collect said amount or any part thereof, from said receiver.

That some time in the year 1896, the then collector of Valencia county, in the Territory of New Mexico, pretended to make and levy the assessment and taxes pretended to be made and as alleged and shown by the allegations contained in paragraph 3 of the intervening petition, and the said collector was wholly without any authority in law or in equity to make said assessment and said levies by reason of the following facts:

That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27, 1866, and that under and by virtue of said act, and prior to the year 1885, the Atlantic and Pacific Railroad Company constructed and built, and has ever since maintained in the county of Valencia, Territory of New Mexico, 93.458 miles of main line of railroad track upon the right of way granted to it under said act of Congress, over and through lands that at the time belonged to the Government of the United States, and over and upon a right of way through lands in said county belonging to private individuals or corporations or associations, which said right of way was and is of the extent of 200 feet in width, under and by virtue of said act of Congress, both through the lands belonging to the United States as well as through the lands belonging to others.

That about 58 miles of said right of way in said county and Ter-
ritory was and is through land which was not Government
142 land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the rights conferred upon it by said act of Congress. That the balance of said right of way was and is over and upon public lands of the United States. That in addition to the main track built upon said right of way, the railroad company built and has maintained on said right of way through Valencia county, in said Territory, 3.433 miles of sidings; making a total amount of trackage in Valencia county in said Territory, in the year 1893, of 96.891

miles; all of which was upon the right of way granted to and acquired by the Atlantic and Pacific Railroad Company, under said act of Congress. That in addition to said trackage, the Atlantic and Pacific Railroad Company in 1893 had in Valencia county in said Territory upon its right of way and as a part thereof, station grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, which were, have been and are now stations upon said line of railroad in said county and Territory, named as follows:

Rio Puerco, San Jose, El Rito, Laguna, Cubero, McCarty's, Grant's, Bluewater.

That upon said right of way and station grounds, prior to 1893, and up to January 1, 1894, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails, sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon
143 bridges and culverts of iron, stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its tracks and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade, which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so imbedded in said grade, so that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main and side tracks; and that the buildings at the stations, above described, are such as were and are necessary for the operation of such railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

That in the year 1893, the Atlantic and Pacific Railroad Company had in said county and Territory, in addition to the property hereinabove described, a large amount of land which it then claimed belonged to it as a part of the lands granted to it by said act of Congress, and it also had some personal property subject to taxation therein.

That on and after the first day of March, 1893, and within the time required by law, one Franco Chavez y Armijo, the then duly qualified and acting assessor of Valencia county, Territory of New Mexico, for the year A. D. 1893, pretended and claimed to assess and to enter upon the assessment-roll for said county and
144 Territory for said year, the assessment of all the property of the Atlantic and Pacific Railroad Company in Valencia county, in said Territory, subject to taxation, and for the purpose of making such assessment in conformity with the requirements of law, made and entered upon the assessment-roll for said year, in

said county, certain entries relative to the Atlantic and Pacific Railroad Company and its property, both real and personal; a true, perfect, correct and complete copy of said assessment-roll, in so far as it shows any entries for the year 1893, of, or concerning the Atlantic and Pacific Railroad Company or its property, is filed herewith, marked "Receiver's Exhibit No. 5," and the same by reference thereto is made a part of this plea.

That thereupon, the said county assessor, upon a leaf in the assessment-roll opposite to the leaf in said roll containing the assessment of the Atlantic and Pacific railroad and its property, as shown by Receiver's Exhibit No. 5, entered and extended the various levies of taxes for said county for said year A. D. 1893, against said property and each item thereof; a full, true and complete copy of the taxes levied against the Atlantic and Pacific Railroad Company and its property, and each item thereof, in said county by said assessor, for said year A. D. 1893, as extended by him upon the page of said assessment-roll opposite the page containing the assessment itself, is shown by the paper herewith filed, marked "Receiver's Exhibit No. 6," which by reference thereto is made a part hereof.

That on the 6th day of July, A. D. 1893, the board of county commissioners of Valencia county, Territory of New Mexico,
145 endorsed on the back of the assessment and tax roll so made by said assessor as aforesaid, their approval and warrant to the collector, a true and correct copy of which is shown on the back of the paper marked "Receiver's Exhibit No. 6," and to which reference is hereby made.

That on the 18th day of September, A. D. 1893, the said assessor duly verified his assessment and tax roll, a true copy of which is shown on the back of the paper marked "Receiver's Exhibit No. 6," and made a part hereof by reference thereto.

That on the 18th day of September, 1893, one Solomon Luna, who was then sheriff and *ex officio* collector of taxes for said county, endorsed upon the copy of the assessment-roll and tax-roll on that day delivered to him by the assessor, a receipt, a copy of which is shown by the endorsement on the back of the paper marked "Receiver's Exhibit No. 6," and made a part hereof by reference thereto.

That the assessor, in the year 1893, in accordance with law, made three assessment-rolls, which contained the assessment of the property both real and personal, of Valencia county, in said Territory, for that year, with the taxes levied and extended thereon against each item of property assessed, in the manner shown by the Receiver's Exhibits No. 5 and No. 6; and one of said assessment-rolls was delivered to the territorial auditor, one of said assessment-rolls was retained in the office of the said assessor, and the other of said assessment-rolls was delivered to the said Solomon Luna, sheriff and *ex officio* tax collector as aforesaid. That Receiver's Exhibits No. 5 and No. 6 filed herewith, are copies of that portion of the assessment and tax roll delivered by the assessor of said county to the
146 said Solomon Luna, as said sheriff and *ex officio* collector, and which in anywise described any property belonging to the Atlantic and Pacific Railroad Company, or against which any tax

was extended or levied for the year A. D. 1893, and such exhibits show exactly everything that was done in that year in the way of assessing the property of said railroad company, and of levying or extending a tax against the same, as the same appears upon the original assessment-roll in the hands of the said Solomon Luna.

That on or about the 28th day of December, 1893, and on or about the 19th day of May, 1894, the Atlantic and Pacific Railroad Company paid to the said Solomon Luna, as sheriff and *ex officio* collector of taxes, the sum of $75.28, being the amount of tax levied on the personal property of the Atlantic and Pacific Railroad Company which was assessed on said assessment-roll in the hands of the said Luna, in the column headed "Value of personal property," in the sum of $2,004.99, as will appear from said Receiver's Exhibit No. 5.

That there was no personal property of any kind, nature or description belonging to said railroad company in Valencia county, which was subject to taxation in that county for the year A. D. 1893, which was not included in the assessment of $2,004.99 aforesaid, and upon which the said tax of $75.28 was levied and paid.

That on or about the 28th day of December, 1893, and on or about the 19th day of May, 1894, the Atlantic and Pacific Railroad Company paid to the said Solomon Luna, as sheriff and *ex officio* collector of Valencia county, the further sum of $1,905.67,
147 being the tax levied against that portion of its land grant which was and is situated in Valencia county in said Territory, and which, upon said assessment-roll under the head of "Value of land" in the hands of said Solomon Luna, was assessed at the sum of $33,833.50, as appears by reference to said Receiver's Exhibit No. 5; true and correct copies of the receipts given by the said Solomon Luna are filed with these pleas marked Receiver's Exhibits Nos. 7, 8, 9 and 10, and by reference thereto made a part hereof.

Solomon Luna, as such sheriff and *ex officio* tax collector, received said assessment-roll, with the taxes extended thereon, and the endorsement shown on the back, which so far as relates to the Atlantic and Pacific Railroad Company or its property, are shown by said Receiver's Exhibits No. 5 and No. 6, and the endorsements on the back thereof.

That no other or further assessment was ever made by any officer of Valencia county in said Territory in the year 1893, of any property belonging to the Atlantic and Pacific Railroad Company other than that shown by Receiver's Exhibit No. 5, and no other or further levy or extension of taxes against such assessment was ever made during said year, for said year, or any other year, save and except that shown by Receiver's Exhibit No. 6.

That the assessment and tax rolls of said county and Territory for said year retained by said assessor and the one sent to the territorial auditor, are substantially duplicates of the one delivered to the said Solomon Luna.

That no person or persons for or on behalf of the Atlantic and Pacific Railroad Company during the year 1893, or at any time

since said time, has made any return of any property to the
148 assessor of Valencia county in said Territory, for the purposes of taxation, save and except that there was returned by the proper officers of said railroad company to the assessor of Valencia county after the first of March, 1893, personal property of the value of $2,004.99, and 169,167.48 acres of land belonging to its land grant, at twenty cents per acre; and that the taxes paid as hereinabove stated and shown by Receiver's Exhibits Nos. 7, 8, 9 and 10, were all the taxes that were levied upon said personal property and said lands so returned as aforesaid.

That the only pretended or claimed levy of taxes against any property of the Atlantic and Pacific Railroad Company for said year remaining unpaid, is that shown to have been extended and levied upon the "right of way" of the Atlantic and Pacific Railroad Company which was and is assessed at the lump sum of $337,103.00, upon the assessment-roll for said year, together with the further sums placed in said assessment-roll in the column headed "Value of personal property" opposite the words contained in the column in said assessment-roll headed "Name of property-owners," save and except as hereinafter stated.

The names and sums referred to are as follows:

Rio Puerco	$1,888 00
San Jose	541 00
El Rito	677 00
Laguna	2,145
Cubero	682 00
McCarty's	1,383 00
Grant's	3,150 00
Bluewater	1,316 00

All of which is shown by the said assessment and levy of
149 taxes upon said assessment-roll, as will fully appear by reference to said Receiver's Exhibits No. 5 and No. 6, and the endorsements thereon.

That prior to the first day of June, 1894, the Atlantic and Pacific Railroad Company paid each and every item of taxes assessed and levied against it or its property in said Valencia county, Territory of New Mexico, save and except only that levied against the assessed value of its "right of way," and that levied against the figures set opposite the names of the stations as hereinabove set forth and described.

That the assessment and all of the proceedings had to charge said property with the taxes levied in 1893 are fully shown by Exhibits 5 and 6 hereto attached and made part of this plea by reference thereto.

That the property assessed by the said collector in the year 1896 was and is the same property so assessed by the said assessor for said county in the year 1893, as aforesaid, except as hereafter stated, and that the said taxes claimed by said intervening petition in the sum of $23,064.63 *was* pretended to be assessed by the collector in the allegations contained in the third paragraph of the intervening

petition, as a tax levied and assessed upon the superstructure of the right of way and station grounds of the Atlantic and Pacific railroad, as hereinabove in this plea stated and set forth, and upon no other property whatsoever.

That about the 14th day of December, 1894, Solomon Luna, tax collector of Valencia county, in the Territory of New Mexico, filed an amended intervening petition in the foreclosure suit in this court then and now pending, wherein The Mercantile Trust Com-
150 pany of New York was plaintiff and The Atlantic and Pacific Railroad Company was defendant, and wherein the predecessors in office of the said C. W. Smith, receiver, were appointed receivers, seeking to recover the taxes in the intervening petition filed by the Territory of New Mexico, sought to be recovered in the allegations set forth and contained in the third paragraph of said intervening petition; a copy of said amended petition is set forth in the first plea herein, and by reference thereto is made a part hereof.

That thereupon the receivers named in said petition filed their certain pleas to said amended petition, denying the right to recover the taxes so assessed for such year and that said pleas have been set down for argument in said cause, but have not yet been heard or disposed of by the court, and that on the first day of February, A. D. 1896, C. W. Smith, herein was duly appointed successor in office as receiver of the property of the Atlantic and Pacific Railroad Company to the receivers named in said amended petition, and that he, the said C. W. Smith, is now, and has been such successor in office in said suit, as well as receiver appointed in the above-entitled cause.

That the said petitions are still pending and undisposed of in this court and involve the taxes sought to be recovered in this action for the years 1892 and 1893, alleged or claimed to be due from the receiver herein and the Atlantic and Pacific Railroad Company to Valencia county in the Territory of New Mexico.

That to each of said petitions of the said Solomon Luna there were filed by the predecessors in office to the said C. W. Smith, receiver herein, pleas which are still undisposed of in said cause.
151 That no further or other assessment was ever made, or attempted to be made by any officer or officers in Valencia county in the Territory of New Mexico for the year 1893 than that heretofore set forth and stated, until in the year 1896, when the tax collector of Valencia county that year claimed or pretended, after receiving the tax-rolls of said county for 1896, to enter up the assessment stated and set forth in paragraph 3 of the intervening petition filed herein.

That all of the taxes levied, as alleged in the third paragraph of said intervening petition, and claimed to have been levied by the collector or any other officer in the county of Valencia, and Territory of New Mexico, for the year 1893, against the property of the Atlantic and Pacific Railroad Company, were and are based upon the assessment of the superstructure placed on the right of way and station grounds of the Atlantic and Pacific railroad, as hereinbefore stated

and set forth, and upon no other assessment whatever, and was and is the same assessment made by the assessor in said county, as hereinbefore stated and set forth, save and except only that the assessment alleged in the third paragraph of the intervening petition did not pretend to be made upon the actual right of way, but only upon its superstructure.

All of which said several matters and things hereinabove stated and set forth, said United States Trust Company of New York and said C. W. Smith, as such receiver, jointly and severally aver to be true, and they each jointly and severally plead the same to the said intervening bill of complaint in so far as the same seeks to recover for taxes alleged to be due from either the Atlantic and Pacific
152 Railroad Company or C. W. Smith, its receiver, for the year 1892, and they each of them jointly and severally humbly crave the judgment of this court whether they be compelled to make any other or further answer to said bill.

C. N. STERRY,
KARL A. SNYDER,
Solicitors and Counsel for Each of the Defendants Joining Herein.

Receiver's Exhibit No. 5.

Assessment-roll for Valencia County, 1893.

Name of property-owner.	Prec'ct No.	Real estate. Fraction or other description.	Section.	T'nship.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.	Value of land.	Value of improvements.	Total value of land & improvements.	Value of cattle.	Val. of per. property.	Fixed by assessor.	Deductions.	Fixed by county commissioners.	Fixed by ter. board equalization.	Final assessed value.
Atlantic & Pacific R. R. Co.																		Rais-d by county commis-sioners.		
Grant'd lands as per list filed.	...	...	...	...	...	169,147.48	.20	...	...	...	$33,833.50	...	...	...	2,004.99	...	...	$16,916.75	...	
		Rio Puerco station	...	...	...	...	...	...	...	...	...	...	...	...	1,888.00					
		San Jose	...	...	...	...	...	...	...	...	...	...	...	...	541.00					
		El Rito	...	...	...	...	...	...	...	...	...	...	...	...	677.00					
		Laguna	...	...	...	...	...	...	...	...	...	...	...	...	2,145.00					
		Cubero	...	...	...	...	...	...	...	...	...	...	...	...	682.00					
		McCarty's	...	...	...	...	...	...	...	...	...	...	...	...	1,383.00					
		Grant's	...	...	...	...	...	...	...	...	...	...	...	...	3,150.00					
		Bluewater	...	...	...	...	...	...	...	...	...	...	...	...	1,316.00					
		Tot. val. right of way	...	...	...	...	...	...	...	...	...	...	327,103.00	...	...	...	...	...	...	391,640.24

RECEIVER'S EXHIBIT No. 6.

Territory of New Mexico, for 1893.

	Territorial tax.								County tax.								City tax.						
	Territorial purposes.	Special deficit, 4th fiscal year.	Normal schools.	Normal institutes.	Branch agricultural experiment stations.	Capitol deficit bonds interest.	Territorial institutions.	Cattle indemnity.	School.	General.	Court fund.	County additional fund.	Road and bridge fund.	Interest, '82 & '83.	Interest, 1885.	Interest, 1885.	Unpaid interest.	Interest on current expense bonds.	Sinking fund.	Total.	Amount due January 1st, 1894.	Amount due July 1st, 1894.	Penalty.	Total tax.
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32	2,349.84	881.19	176.24	19.58	97 91	97.91	685.37	.....	783.28	979.10	1,958.20	195.82	195.82	881.19	1,253.25	1,762.38	979.10	234.98	1,174.92	.....	7,353.09	7,350.09		
33																								
34																								

Dollar, cent, and mill (\$ c. m.) marks omitted.

155 *Oath of Assessor.*

I, Franco Chavez y Armijo, assessor of the county of Valencia, Territory of New Mexico, do solemnly swear that during the whole time allowed by law to make this assessment, I have made diligent inquiry and examination to ascertain all the property within said county, subject to taxation, and that I have assessed it on the assessment book equally and uniformly to the best of my judgment, information and belief, at its full cash value, and that I have faithfully complied with all the duties imposed upon the assessor by the revenue laws of the Territory, and that I have not imposed any unjust assessment through malice or ill-will, nor allowed any one to escape a just and equal assessment through favor or reward, so help me God.

FRANCO CHAVEZ Y ARMIJO.

Sworn to and subscribed before me this 18th day of September, A. D. 1893.

M. LUNA,
Probate Clerk, etc.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

Office of board of county commissioners.

At a regular session, held on the 6th day of July, A. D. 1893—

It is ordered by the board of county commissioners of said county: That the preceding assessment-roll, and each and every assessment therein contained, as originally returned and assessed or as shown therein to have been revised and corrected by the board, be and the same is hereby approved.

156 And that a tax of 1.73 of one per cent. for county purposes, and of two mills on the dollar for school purposes, and of .05 mills on the dollar for court fund, and 1.10 per cent. for various territorial funds, to wit:

Fifty one-hundredths mills for cattle indemnity fund; for territorial purposes, 6 mills on the dollar; for special deficit levy for 44th fiscal year, 2.25 mills on the dollar; for normal school fund, $\frac{45}{100}$ mills on the dollar; for normal school institutes fund $\frac{5}{100}$ mills on the dollar; for branch agricultural experiment stations fund, $\frac{25}{100}$ mills on the dollar; for casual deficit bonds interest fund, $\frac{25}{100}$ mills on the dollar; for territorial institutions fund, 1.75 mills on the dollar; for cattle indemnity fund on the appraised value of cattle, $\frac{50}{100}$ mills on the dollar, is hereby levied upon all the property therein returned assessed liable to taxation.

And it is further ordered that the county assessor extend the several said rates of taxes upon the tax-roll for the year 1893, and that upon the delivery of the tax-roll to the county collecter the clerk of the board shall charge said collector with the aggregate amount of said taxes as provided by law:

To the sheriff and *ex officio* collector of Valencia county, in said Territory, Greeting:

You are hereby commanded, in accordance with the laws of said Territory, in such cases made and provided, to collect all the territorial, county, school, city and all other taxes above enumerated and specified, levied on the citizens of said county, and non-resident owners, whose property may have been assessed in your county, and all taxes assessed upon property within your county as appears from the tax-list of said county for the year 1893, being the foregoing tax-list, and the delinquent tax-lists of said county for the previ-
157 ous years, and also that you collect all interest due on delinquent taxes as provided by the laws of said Territory.

In witness whereof we have hereunto set our hands and caused the seal of said board to be hereunto affixed, attested by the clerk of said board, this 6th day of July, A. D. 1893.

CARLOS BACA,
Chairman of Board.
MANUEL S. SANCHEZ,
Commissioner.

Attest: M. LUNA,
Probate Clerk and ex Officio Clerk of the Board of County Commissioners.

N. M., A. D. 189–.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

Received of Maximiliano Luna, probate clerk and *ex officio* clerk of the board of county commissioners of said county, the tax-lists or assessment-rolls of said county for the year 1893, which amount to $63,035.89 territorial, school, and county funds, viz:

For territorial purposes	$10,698 80
For special deficit levy for 44th fiscal year	4,012 80
For normal school fund	802 60
For normal school institutes fund	88 96
For branch agricultural experimental stations fund	446 13
For casual deficit bonds interest fund	446 13
For territorial institutions fund	3,121 13
For cattle indemnity fund	79 52
For school fund	3,566 63
For general fund	4,459 27
For court fund	8,917 36
For county additional fund	892 32
For road and bridge fund	892 32
158 For interest on bonds 1882 and 1883	4,012 80
For interest on bonds 1885	5,706 51
For interest on bonds 1889	8,025 16
For unpaid interest fund	446 13
For interest on current expense bond fund	1,070 35
For sinking fund	5,350 70

Witness my hand this 18th day of September, A. D. 1893.

SOLOMON LUNA,
Sheriff and ex Officio Collector in and for said County.

RECEIVER'S EXHIBIT No. 7.

(513.)

Auditor's No., 2675; series 10.

Recorded in January, 1894.

Atlantic and Pacific Railroad Company (Western division) to Solomon Luna, sheriff and collector, Dr., Los Lunas, Valencia Co., N. M.

1893.

Dec. 28	To amount of taxes claimed to be due and payable to the tax collector of Valencia county, N. M., on the personal property of said company, for the first half of the year 1893, as follows:		
	Valuation, $2,004.99, at $3.755 per $100.00	$75 28	
	First installment, ½	.....	$37 64

Examined by—
D. E. S.

Correct:
— —.

Approved:
— —.

Approved:
KARL A. SNYDER,
For Gen. Att'y.

Approved:
T. R. GABEL,
Gen. Supt.

Approved:
W. E. WALSH,
Auditor.

159

Division.	Acc't No.	Passenger.	Freight.	Common.
Taxes	....	....	....	$37 64

Received ——, 189–, from the Atlantic and Pacific Railroad Company thirty-seven and $\frac{64}{100}$ dollars, in full payment of above amount.

SOLOMON LUNA, *Sheriff.*

$37.64.

160

RECEIVER'S EXHIBIT No. 8.

No. 309. Tax-roll 189–.

Precinct No. —. Page No. —.

Tax Receipt.

Office of sheriff and *ex officio* collector, Valencia county, N. M.

LOS LUNAS, NEW MEXICO, *Jan. 29th*, 1894.

Received from Atlantic and Pacific R. R. Co. nine hundred and fifty two $\frac{84}{100}$ dollars, in payment of one-half of taxes levied in the year 1893, delinquent January 1, 1894, on the following-described property, to wit:

Distribution.		Description of real estate.
Territorial purposes		Granted lands as per list filed, 169,167.48 acres at 30c. per acre, $50,750.25.
Special deficit 44th fiscal year		
Normal schools		
Normal institutes		
Branch agricultural experiment stations		
Casual deficit bond interest		
Territorial institutions		
Cattle indemnity fund		
Taos County sub agricultural experiment station		
School fund		
General fund		
Court fund		
County additional fund		
Roads and bridges fund		
Interest on bonds 1882–'3		
Interest on bonds 1885		
Interest on bonds 1889		Real-estate valuation.
Unpaid interest fund		Personal property.
Interest on general expense bonds		Valuation.
Sinking fund		Total.
Penalty		Exemption.
Total	$952 84	Subject to tax.

Value of cattle $—.

SOLOMON LUNA,
Sheriff and ex Officio Collector,
Per —— ——, *Deputy.*

161 RECEIVER'S EXHIBIT No. 9.

Triplicate.

Auditor's No., 2579; series 10.

Recorded in May, 1894.

Atlantic and Pacific Railroad Company (Western division) to Solomon Luna, sheriff and collector, Los Lunas, N. M., Dr.

1894.

May 19	To amount of taxes claimed to be due and payable to taxe ollector of Valencia county, New Mexico, from the Atlantic & Pacific Railroad Company, for the second half of the year 1893, upon the land grant in said county, as follows:		
	119,867.48 acres at 30c..... ..... $50,750 25		
	Tax at $3.755 per $100.00.....	$1,905 67	
	Second installment.....	....	$952 83

Examined by— D. E. S. Correct: —— ——. Approved: —— ——.

Approved: KARL A. SNYDER, *For Gen. Att'y.* Approved: T. R GABEL, *Gen. Supt.* Approved: W. E. WALSH, *Auditor.*

Division.	Acc't No.	Passenger.	Freight.	Common.
Transfers Boston office.				

Received July 10, 1892, from Atlantic & Pacific Railroad Company nine hundred and fifty-two and $\frac{83}{100}$ dollars, in full payment of above account.

SOLOMON LUNA,
Sheriff and Collector.

$952.83.

162 RECEIVER'S EXHIBIT No. 10.

(307.)

Original.

Auditor's No., 3577; series —.

Recorded in May, 1894.

Atlantic and Pacific Railroad Company (Western division) to Solomon Luna, sheriff and collector, Los Lunas, Valencia Co., N. M., Dr.

1894.

May 19	To amount of taxes claimed to be due and payable to the tax collector of Valencia county, N. M., upon the personal property of said company, in said county, for the second half of the year 1893, as follows:		
	Valuation, $2,004.99, tax at $3.755 per $100.00.....	$75 28	
	Second installment, ½.....	.....	$37 64

Examined by— —— —.

Correct: —— —.

Approved: —— —.

Approved: KARL A. SNYDER, *For Gen. Att'y.*

Approved: J. F. E. PHILLIPS, *Auditor.*

Approved: T. R. GABEL, *Gen. Supt.*

Charge to account.

No.	Letter.	Amount.
Taxes ...	.....	$37 64
Common..	.....	$37 64

Received July 10, 1894, from Atlantic & Pacific Railroad Company thirty-seven $\frac{64}{100}$ dollars, in full payment of above account.
(Signed in duplicate.)

SOLOMON LUNA,
Sheriff and Collector.

163 *Third Plea.*

The United States Trust Company of New York and C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company, for their third plea to the intervening petition filed herein, by protestation, not confessing or acknowledging all or any part of the matters and things in said intervening petition mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto in relation to the amount of taxes alleged to have been levied and assessed for the year 1894, against the Atlantic and Pacific Railroad Company in the sum of $23,020.16, the following facts in bar thereto and in bar to the right of the Territory of New Mexico, to receive and collect said amount or any part thereof, from said receiver.

That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27, 1866, and that under and by virtue of said act, and prior to the year 1885, the Atlantic and Pacific Railroad Company constructed and built, and has ever since maintained in the county of Valencia, Territory of New Mexico, 93.458 miles of main line of railroad track upon the right of way granted to it under said act of Congress, over and through lands that at that time belonged to the Government of the United States, and over and upon a right of way through lands in said county belonging to private individuals or corporations or associations, which said right of way was and is of the extent of 200 feet in width, under and by virtue of said act of Congress, both through the lands belonging to the United States as well as through the lands belonging to others.

164 That about 58 miles of said right of way in said county and Territory was and is through land which was not Government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress. That the balance of said right of way was and is, over and upon public lands of the United States. That in addition to the main track built upon said right of way, the railroad company built and has maintained on said right of way through Valencia county, in said Territory, 3.433 miles of sidings; making a total amount of trackage in Valencia county in said Territory in the year 1894 of 96.891 miles; all of which was upon the right of way granted to and acquired by the Atlantic and Pacific Railroad Company under said act of Congress. That in addition to said trackage, the Atlantic and Pacific Railroad Company in 1894 had in Valencia county, in said Territory, upon its right of way and as a part thereof, station grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, which were, have been and are now stations upon said line of railroad in said county and Territory, named as follows:

Rio Puerco, San Jose, El Rito, Laguna, Cubero, McCarty's, Grant's, Bluewater.

That upon said right of way and station grounds, prior to 1894, and up to January 1, 1895, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails sufficient to make a railroad track to operate its trains upon, and all necessary station buildings,

165 depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon bridges and culverts of iron, stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its tracks and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade, which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so embedded in said grade, so that the same form a substantial and permanent railroad

track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains, thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side tracks; and that the buildings at the stations above described are such as were and are necessary for the operation of the said railroad by said railroad company, and are permanently attached and affixed to said station grounds and right of way.

That in the year 1894 the Atlantic and Pacific Railroad Company had in said county and Territory, in addition to the property hereinabove described, a large amount of land, which it then claimed belonged to it as a part of the lands granted to it by said act of Congress, and it also had some personal property subject to taxation therein.

That some time in the year 1896, the then collector of Valencia county, in the Territory of New Mexico, pretended to make and levy the assessment and taxes pretended to be made, and as
166 alleged and shown by the allegations contained in paragraph 4 of the intervening petition, and the said collector was wholly without any authority in law or in equity to make said assessment and said levies by reason of the foregoing and following facts:

That some time in the year 1894, and after the first day of March, A. D. 1894, the exact date of which these defendants are unable to state, the duly appointed, qualified and acting assessor of Valencia county, in the Territory of New Mexico, made and entered upon his books an assessment, in the words and figures following, to wit:

"1894.

Atlantic and Pacific Railroad Company.

Lands as per itemized list, 93.458 miles.
Main track at $6,500.00.
Rio Puerco station.
San Jose station.
El Rito station.
Laguna station.
Cubero station.
McCarty's station.
Grant's station.
Bluewater station.
No. of acres, 169,167.48 at 20c.
Value of land, $33,833.00.
Value of personal property, $2,004.99."

That thereafterwards on that assessment being returned, the board of county commissioners of said county in session as a board of equalization, raised said assessment so made by the asssessor and made the assessment of which the following is a true and correct copy:

" Fixed by county commissioners.

167 $84,583.74.
$607,477.00.

$2,289.00.....Rio Puerco station
$541.00.....San Jose station
$842.00.....El Rito station
$4,025.00.....Laguna station
$700.00.....Cubero station
$1,045.00.....McCarty's station
$3,150.00.....Grant's station
$4,757.00.....Bluewater station

Final assessed value, $711,414.73."

That thereafterwards in conformity to the provisions of the laws of the Territory of New Mexico, there was levied against the assessment so made by the assessor, by the proper authorities of Valencia county, in the Territory of New Mexico, taxes in the aggregate amounting to $26,144.46.

That of the taxes so levied, the predecessors in office of the said C. W. Smith, receiver, paid all the taxes assessed by the assessor of the personal property so assessed, as shown hereinabove and paid the taxes levied upon the assessment of the 169,167.48 acres of land assessed by said assessor, but refused to pay the balance of the taxes because of the fact that the assessment as made by said assessor and increased by said board of equalization, was an assessment of the right of way and station grounds of the Atlantic and Pacific railroad, which were and are exempt under the act of Congress creating said railroad company, and that thereupon and thereafterwards and at a date unknown to these defendants, but during the year 1896, the tax collector for said county made the assessment levied and set forth in the fourth paragraph of the intervening petition,
168 which said assessment was and is an assessment upon the superstructure on the right of way of the Atlantic and Pacific Railroad Company and the station grounds appurtenant thereto, and upon no other property of any kind or description, all of which articles so assessed were, are and always have been since the construction of the said railroad, a part of the said right of way and station grounds, and that no other property of any kind or description entered into said assessment, and that the property so assessed has been fully hereinbefore and above set forth and described.

All of which said several matters and things hereinabove stated and set forth said United States Trust Company of New York and said C. W. Smith, as such receiver, jointly and severally aver to be true, and they each jointly and severally plead the same to the said intervening bill of complaint in so far as the same seeks to recover for taxes alleged to be due from either the Atlantic and Pacific Railroad Company, or C. W. Smith, its receiver, for the year 1894, and they each of them jointly and severally humbly crave the judgment

of this court whether they be compelled to make any other or further answer to the said bill.

C. N. STERRY,
KARL A. SNYDER,
Solicitors and Counsel for Each of the Defendants Joining Herein.

Fourth Plea.

The United States Trust Company of New York, and C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company,
169 for their fourth plea to the intervening petition filed herein, by protestation, not confessing or acknowledging all or any part of the matters and things in said intervening petition mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto in relation to the amount of taxes alleged to have been levied and assessed for the year 1895 against the Atlantic and Pacific Railroad Company in the sum of $23,020.16, the following facts in bar thereto and in bar to the right of the Territory of New Mexico to receive and collect said amount or any part thereof, from said receiver.

That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27, 1866, and that under and by virtue of said act, and prior to the year 1885, the Atlantic and Pacific Railroad Company constructed and built and has ever since maintained in the county of Valencia, Territory of New Mexico, 93.458 miles of main line of railroad track upon the right of way granted to it under said act of Congress, over and through lands that at that time belonged to the Government of the United States and over and upon a right of way through lands in said county belonging to private individuals or corporations or associations, which said right of way was and is of the extent of 200 feet in width under and by virtue of said act of Congress, both through the lands belonging to the United States, as well as through the lands belonging to others.

That about 58 miles of said right of way in said county and Territory was and is through land which was not Government land,
but which belonged to private individuals or corporations,
170 and was acquired by the railroad company under and through the right conferred upon it by said act of Congress. That the balance of said right of way was and is over and upon public lands of the United States. That in addition to the main track built upon said right of way, the railroad company built and has maintained on said right of way, through Valencia county, in said Territory, 3.433 miles of sidings, making a total amount of trackage in Valencia county in said Territory in the year 1895 of 96.891 miles; all of which was upon the right of way granted to and acquired by the Atlantic and Pacific Railroad Company under said act of Congress. That in addition to said trackage, the Atlantic and Pacific Railroad Company in 1895 had in Valencia county, in said Territory, upon its right of way and as a part thereof, station

grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, which were, have been, and are now stations upon said line of railroad in said county and Territory named as follows:

Rio Puerco, San Jose, El Rito, Laguna, Cubero, McCarty's, Grant's, Bluewater.

That upon said right of way and station grounds, prior to 1895, and up to January 1, 1896, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon bridges and culverts of iron, stone and wood; and it also built, estab-
171 lished and maintained over, along and upon its said right of way, a grade for its tracks and side tracks which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so embedded in said grade, so that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains, thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side tracks; and that the buildings at the stations above described, are such as were and are necessary for the operation of said railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

That in the year 1895 the Atlantic and Pacific Railroad Company had in said county and Territory in addition to the property hereinabove described, a large amount of land, which it then claimed belonged to it as a part of the land granted to it by said act of Congress, and it also had some personal property subject to taxation therein.

That some time in the year 1896, the then collector of Valencia county, in the Territory of New Mexico, pretended to make and levy the assessment and taxes pretended to be made and as alleged and shown by the allegations contained in paragraph 5 of the intervening petition, and the said collector was wholly with-
172 out any authority in law or in equity to make said assessment and said levies by reason of the foregoing and following facts:

That some time in the year 1895, and after the first day of March, A. D. 1895, the exact date of which these defendants are unable to state, the duly appointed, qualified and acting assessor of Valencia county, in the Territory of New Mexico, made and entered upon his books an assessment in the words and figures following, to wit:

"1895.

"Atlantic and Pacific Railroad Company.

"Section tools and miscellaneous property, office, station and telegraph furniture, personal property of the A. and P. R. R. Co., Jno. J. McCook, A. F. Walker, and J. C. Wilson, receivers. Fixed by assessor.

"Cross-ties, rails, fish-plates, spikes, culverts, bridges, depots, turntables, side tracks, buildings and entire superstructure on right of way, 93.7 miles in Valencia county at $6,500.00 per mile. Land as per specified list. No. of acres, 265,361.91, at 20 cents per acre. Value of land, $53,072.38. Value of personal property, $609,050.00. Fixed by county commissioners, $79,608.57. Final assessed value, $609,663.56."

That thereafterwards in conformity to the provisions of the laws of the Territory of New Mexico, there *was* levied against the assessment so made by the assessor, by the proper authorities of Valencia county, in the Territory of New Mexico, taxes in the aggregate amounting to $25,381.84.

That of the taxes so levied, the predecessors in office of the said C. W. Smith, receiver, paid all the taxes assessed by the assessor of the personal property so assessed, as shown hereinabove and
173 paid the taxes levied upon the assessment of the 265,361.91 acres of land assessed by said assessor, but refused to pay the balance of the taxes because of the fact that the assessment as made by said assessor, was an assessment of the right of way and station grounds of the Atlantic and Pacific railroad, which were and are exempt under the act of Congress creating said railroad company, and that thereupon and that thereafterwards, and at a date unknown to these defendants, but during the year 1896, the tax collector for said county made the assessment levied and set forth in the fifth paragraph of the intervening petition which said assessment was and is an assessment upon the superstructure on the right of way of the Atlantic and Pacific Railroad Company, and the station grounds appurtenant thereto, and upon no other property of any kind or description, all of which articles so assessed were, are, and always have been since the construction of the said railroad a part of the said right of way and station grounds, and that no other property of any kind or description entered into said assessment, and that the property so assessed has been fully hereinbefore and above set forth and described.

All of which said several matters and things hereinabove stated and set forth said United States Trust Company of New York and said C. W. Smith, as such receiver, jointly and severally aver to be true, and they each jointly and severally plead the same to the said intervening bill of complaint in so far as the same seeks to recover for taxes alleged to be due from either the Atlantic and Pacific Railroad Company, or C. W. Smith, its receiver, for the year 1895,
174 and they each of them jointly and severally humbly crave

the judgment of this court whether they be compelled to make any other or further answer to the said bill.

C. N. STERRY,
KARL A. SNYDER,
Solicitors and Counsel for Each of the Defendants Joining Herein.

Fifth Plea.

The United States Trust Company of New York, and C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company, for their fifth plea to the intervening petition filed herein, by protestation, not confessing or acknowledging all or any part of the matters and things in said intervening petition mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto in relation to the amount of taxes alleged to have been levied and assessed for the year 1896 against the Atlantic and Pacific Railroad Company in the sum of $24,272.96, the following facts in bar thereto and in bar of the right of the Territory of New Mexico to receive and collect said amount or any part thereof, from said receiver.

That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27, 1866, and that under and by virtue of said act, and prior to the year 1885, the Atlantic and Pacific Railroad Company constructed and built, and has ever since maintained in the county of Valencia, Territory of New Mexico, 93.458 miles of main line of railroad track upon the right of way granted to it under said
175 act of Congress, over and through lands that at that time belonged to the Government of the United States and over and upon a right of way through lands in said county belonging to private individuals or corporations or associations, which said right of way was and is of the extent of 200 feet in width under and by virtue of said act of Congress, both through the lands belonging to the United States, as well as through the lands belonging to others.

That about 58 miles of said right of way in said county and Territory was and is through land which was not Government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress. That the balance of said right of way was and is over and upon public lands of the United States. That in addition to the main track built upon said right of way, the railroad company built and has maintained on said right of way through Valencia county, in said Territory, 3.433 miles of sidings; making a total amount of trackage in Valencia county in said Territory, in the year 1896, of 96.891 miles; all of which was upon the right of way granted to and acquired by the Atlantic and Pacific Railroad Company under said act of Congress. That in addition to said trackage, the Atlantic and Pacific Railroad Company in 1896 had in Valencia county, in said Territory, upon its right of way and as a part thereof, station grounds for station build-

ings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, which were, have been and are now stations upon said line of railroad in said county and Territory, named as follows:

176 Rio Puerco, San Jose, El Rito, Laguna, Cubero, McCarty's, Grant's, Bluewater.

That upon said right of way and station grounds, prior to 1896, and up to January 1, 1897, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails, sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon bridges and culverts of iron, stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its tracks and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade, which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so embedded in said grade, so that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains, thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side tracks; and that the buildings at the stations, above described, are such as were and are necessary for the operation of the said railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

177 That in the year 1896 the Atlantic and Pacific Railroad Company had in said county and Territory, in addition to the property hereinabove described, a large amount of land which it then claimed belonged to it as a part of the lands granted to it by said act of Congress, and it also had some personal property subject to taxation therein.

That some time in the year 1896 the then collector of Valencia county in the Territory of New Mexico, pretended to make and levy the assessment and taxes pretended to be made and as alleged and shown by the allegations contained in paragraph 6 of the intervening petition, and the said collector was wholly without any authority in law or in equity to make said assessment and said levies by reason of the foregoing and following facts:

That some time in the year 1896, and after the first day of March, A. D. 1896, the exact date of which these defendants are unable to state, the duly appointed, qualified and acting assessor of Valencia county, in the Territory of New Mexico, made and entered upon his assessment book an assessment in the words and figures following, to wit:

"1896.

Atlantic and Pacific Railroad Company.

Section tools and miscellaneous property, value of personal property $315.99.

Office, station and telegraph furniture, value of personal property $1,689.00.

Personal property of the A. and P. R. R. Co., C. W. Smith, receiver, taxed by assessor:

Cross-ties, rails, fish-plates, spikes, culverts, bridges, depots, turntables, side tracks, buildings and entire superstructure on right of way 93.7 miles in Valencia county at $6,500.00 per mile.

178 Lands as per list attached to return, amount of acres 253,423.21 at 20c.

Total value of land and improvements, $50,684.64.

Value of personal property, $609,050.

Fixed by assessor, $126,711.60."

That thereafterwards, on that assessment being returned, the board of county commissioners of said county, in session as a board of equalization, changed said assessment so made by the assessor and fixed the value of land at $76,026.96, as follows:

Fixed by county commissioners, $76,026.96.

Final assessed value, { $2,004.99. / $609,050.00. / $76,026.96.

That thereafterwards, in conformity to the provisions of the laws of the Territory of New Mexico, there *was* levied against the assessment so made by the assessor, by the proper authorities of Valencia county, in the Territory of New Mexico, taxes in the aggregate amounting to $26,624.41.

That of the taxes so levied, the said C. W. Smith, receiver, paid all the taxes assessed by the assessor of the personal property so assessed, as shown hereinabove, and paid the taxes levied upon the assessment of the 253,423.21 acres of land assessed by said assessor, but refused to pay the balance of the taxes because of the fact that the assessment as made by the assessor was an assessment of the right of way and station grounds of the Atlantic and Pacific railroad, which were and are exempt under the act of Congress creating said railroad company, and that thereupon and thereafterwards and at a date unknown to these defendants, but during the year 1896,

179 the tax collector for said county made the assessment levied and set forth in the fourth paragraph of the intervening petition, which said assessment was and is an assessment upon the superstructure on the right of way of the Atlantic and Pacific Railroad Company and the station grounds appurtenant thereto, and upon no other property of any kind or description, all of which articles so assessed were, are and always have been since the construction of the said railroad a part of the said right of way and station grounds, and that no other property of any kind or descrip-

tion entered into said assessment, and that the property so assessed has been fully hereinbefore and above set forth and described.

All of which said several matters and things hereinabove stated and set forth, said United States Trust Company of New York and said C. W. Smith, as such receiver, jointly and severally aver to be true, and they each jointly and severally plead the same to the said intervening bill of complaint in so far as the same seeks to recover for taxes alleged to be due from either the Atlantic and Pacific Railroad Company or C. W. Smith, its receiver, for the year 1896, and they each of them jointly and severally humbly crave the judgment of this court whether they be compelled to make any other or further answer to the said bill.

C. N. STERRY,
KARL A. SNYDER,
Solicitors and Counsel for Each of the Defendants Joining Herein.

And thereafter, on, to wit, the 23rd day of June, A. D. 1897, the same being in vacation, there was entered of record a decree dismissing intervening petition of Territory for Valencia County
180 taxes, and order allowing appeal, which said decree is in the words and figures following, to wit:

In the District Court, Second Judicial District, Territory of New Mexico.

UNITED STATES TRUST COMPANY OF NEW YORK }
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY ET AL. }

In the matter of the intervening petition of the Territory of New Mexico filed in the above-entitled cause.

The said matter coming on to be heard upon the question of the sufficiency of the joint and several pleas of the United States Trust Company and Charles W. Smith, receiver of the property of the Atlantic and Pacific Railroad Company, to the said intervening petition, for the collection of taxes alleged to be due in Valencia county, after hearing F. W. Clancy for the said intervening petitioner and Karl A. Snyder, Esq., on behalf of the said trust company and the said receiver, the court being sufficiently advised in the premises finds that it is neither necessary nor proper to pass upon the question of the sufficiency of said pleas for the reason that the said intervening petition and matters and things therein set up fall within the decision of the supreme court of New Mexico in the matter of a like intervening petition in this cause, rendered on the 18th of December, 1896, and are therefore not sufficient to entitle the said intervening petitioner to the relief sought by its petition, and that this petition ought to be dismissed.

It is therefore ordered, adjudged and decreed, that the said intervening petition be and the same hereby is dismissed, and
181 thereupon the said intervening petitioner prays the court for an appeal to the supreme court of the Territory of New

Mexico from the order and decree of this court. It is therefore ordered by the court that the said intervening petitioner be and it hereby is allowed an appeal from the said order and decree of this court to the supreme court of the Territory of New Mexico.

(Signed) N. C. COLLIER, *Judge.*

And thereafter, to wit, on the 19th day of December, 1898, a petition for an order authorizing the clerk of said court to publish a notice to the creditors of C. W. Smith, late receiver of Atlantic and Pacific Railroad Company, was filed in the office of the said clerk in said cause, which said petition is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court of said County and Territory, Sitting for the Trial of Causes Arising under the Laws of the United States.

UNITED STATES TRUST COMPANY
vs.
ATLANTIC & PACIFIC RAILROAD COMPANY ET AL.

To the Honorable J. W. Crumpacker, district judge of said court:

Your petitioner, The Santa Fe Pacific Railroad Company, represents and shows to your honor:

That it is a corporation organized under the act of Congress, approved March 3, 1897; that on the 24th day of June, 1897, Aldace F. Walker, R. Somers Hays and Victor Morawetz conveyed to your petitioner all the property mentioned and described in the deed from the special master to the above-named persons, under date of
182 June 10, 1897, and that your petitioner is now, and ever since the first day of July, 1897, has been, the owner of and in the possession of all the property conveyed by said special master, under the decree of this court in the above-entitled cause; that on the fourth day of October, 1898, C. W. Smith, the receiver in said cause, was, by the order of this court, discharged, as such receiver; that, prior to his discharge, the receiver failed and neglected to publish a notice to claimants having claims, or claiming to have claims against him, as required by the 19th paragraph of the decree made by this court in said cause.

Your petitioner further asks the court that, in view thereof, the said decree be modified to authorize the clerk of this court to publish the notice required to be published to persons claiming to have claims against said receiver, and requiring such persons to present and file the same with the clerk of said court, within six months after the date of the first publication thereof, the publication of said notice to be made in the papers required by said decree.

SANTA FE PACIFIC RAILROAD COMPANY,
By C. N. STERRY, *Its Attorney.*

And the prayer of said petition having been granted by an order made and entered of record in said cause on the 19th day of December, 1898, the clerk of said court caused a notice to creditors to be published at least once a week for six consecutive weeks in the following newspapers, to wit: The Morning Journal-Democrat, published at Albuquerque, New Mexico; the Journal-Miner, published at Prescott, Arizona, and the Journal, published at Los
183 Angeles, California; which said notice is in the words and figures following, to wit:

Notice to Creditors.

To all creditors of C. W. Smith, as the late receiver of the Atlantic & Pacific Railroad Company:

You are hereby notified that you must, on or before the twenty-third day of October, 1899, file with the undersigned, clerk of the district court of the second judicial district, in the Territory of New Mexico, for the hearing and trial of causes arising under the laws and Constitution of the United States, any and all claims which you or any of you may have against the late receiver, C. W. Smith, as receiver of the Atlantic & Pacific Railroad Company.

Claims not so filed within said time will be forever barred.

This notice is published under the order of said court in the case of The United States Trust Company *vs.* Atlantic & Pacific Railroad Company *et al.*, on the 19th day of December, 1898.

HARRY P. OWEN,

Clerk of the District Court of the Second Judicial District for the Territory of New Mexico, Sitting for the Hearing and Trial of Causes Arising under the Constitution and Laws of the United States.

First publication April 3, 1899.

And thereafter, to wit, on the 4th day of August, 1899, there was filed in the office of the clerk of said court, in said cause, a judgment upon the mandate from the supreme court of New Mexico, which said judgment is in words and figures as follows, to wit:

184 In the District Court, Second Judicial District, Territory of New Mexico.

UNITED STATES TRUST COMPANY OF NEW YORK ET AL.
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY.

Now comes the Territory of New Mexico, intervening petitioner in this cause, by F. W. Clancy, its solicitor, and presents to the court here the mandate of the supreme court of the Territory of New Mexico, from which it appears that the judgment of the said supreme court entered against the said intervening petitioner on the 23rd day of August, 1897, was by the Supreme Court of the United

States at its October, 1898, term, reversed and judgment entered that appellant recover of appellees $255.45 for its costs and have execution therefor, and that the cause was remanded to the said supreme court of the Territory of New Mexico for further proceedings in accordance with the opinion of said Supreme Court of the United States; and by which mandate this court is commanded to reinstate said cause upon its docket and to vacate and set aside its decree of the 23rd day of June, 1897, so far as the same dismissed the intervening petition of appellant, and further to proceed herein in accordance with the said opinion of the Supreme Court of the United States, and to enter a judgment against said appellees for said sum of $255.45 costs aforesaid and also $340.10 costs, taxed in the said supreme court of the Territory of New Mexico and to award execution for the same or to enforce the payment thereof by any proper order; and the said intervening petitioner asks this court for
185 judgment upon said mandate in accordance with the terms and command thereof.

It is therefore ordered, adjudged and decreed by this court that the said cause be and the same hereby is reinstated upon the docket of this court; that the decree of this court of the 23rd day of June, 1897, so far as the same dismissed the said intervening petition, be and the same hereby is vacated and set aside; that leave be and the same hereby is given to the said intervening petitioner further to proceed herein in accordance with the said opinion of the Supreme Court of the United States; that the said intervening petitioner recover its costs in this behalf expended, in the Supreme Court of the United States and as well in the supreme court of the Territory of New Mexico amounting to $595.55 and that it have execution therefor.

J. W. CRUMPACKER,
Associate Justice.

That afterwards, to wit, on the 27th day of September, 1899, there was filed in the office of the clerk of said court, in said cause, an amended motion to dismiss, which said motion is in words and figures as follows, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

United States Trust Company of New York, Complainant,
vs.
The Atlantic & Pacific Railroad Company *et al.*, Defendants.
} In Equity. No. 1122.

In the matter of the intervening petition of the Territory of
186 New Mexico in the above-entitled cause to collect certain taxes alleged to be due in Valencia county, New Mexico.

Amended Motion to Dismiss.

Comes now C. W. Smith, the former receiver in the above-entitled cause, and the United States Trust Company of New York, for the purposes of this motion, and each of said parties, jointly and severally, move the court to dismiss the interplea of the Territory of New Mexico, filed herein, for the following reasons, to wit:

1st. That the receiver, C. W. Smith, was, on or about the 26th day of April, 1898, discharged as receiver in said cause, and from that time to this, the said receiver has had no funds or property in his hands wherewith to answer any judgment that might be rendered against him as such receiver.

2d. That it appears from the files in the above-entitled cause that at the time of the filing of the intervening petition herein, all of the property in the hands of the receiver and in the custody of the court had been sold and conveyed to third parties under the decree of this court, who were not, and have not been made parties hereto.

3d. That the claims and demands set forth and stated in the intervening petition filed herein were never presented to the parties who purchased the property sold under the decree of foreclosure in this cause, or their assigns, and that no notice was ever given to such purchasers or their assigns that any such claims or demands would be filed by the Territory of New Mexico in this cause, prior to the filing of the intervening petition herein, and neither said
187 purchasers nor their assigns ever refused any payment thereof upon any demand or otherwise.

4th. That the United States Trust Company at the time of the filing of the said interplea had not and never since has had any interest in the subject-matter of this intervening petition as fully appears from the records and files in this cause.

5th. That the name of the Territory of New Mexico, as used in the intervening petition is without any right, leave or authority on the part of the party using the same.

6th. That no suit or intervening petition was ever authorized by any person, or persons authorized to use the name of the Territory of New Mexico.

7th. That this motion will be based on the files in this cause and

the affidavits of C. N. Sterry attached to the motion to dismiss, filed in this cause.

C. N. STERRY,
Attorney for C. W. Smith and the United States Trust Company of New York.

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE ATLANTIC & PACIFIC RAILROAD COMPANY ET AL., Defendants.

In the matter of the intervention of the Territory of New Mexico in the above-entitled cause to collect certain taxes alleged to be due in Valencia county, New Mexico.

188 TERRITORY OF NEW MEXICO, }
County of Bernalillo, } *ss:*

C. N. Sterry, of lawful age, being first duly sworn, deposes and says:

That in January, 1892, he was appointed general attorney of the Atlantic & Pacific Railroad Company (Western division), which was incorporated under the act of Congress approved July 27, 1866; that upon his appointment he moved to and became a resident of Albuquerque, in the Territory of New Mexico, in the winter of 1892, and lived there as a citizen until the summer or fall of 1896. That up to the 4th day of January, 1894, affiant remained general attorney of the Western division of the Atlantic & Pacific Railroad Company, and that during all of that time, the headquarters of said railroad company, so far as the operating, claim, tax and legal departments were concerned, was at said city of Albuquerque, and that during all of that time affiant had the sole charge of the tax, claim and legal departments of said company, for its Western division, subject to the control of the general solicitor, the Hon. Geo. R. Peck, who at that time resided in the city of Chicago in the State of Illinois. Affiant during all of said time made the returns required by the laws of said Territory to be made of the property of the Atlantic & Pacific Railroad Company for assessment, and paid the taxes that were legally levied upon the property. That on or about January 4, 1894, the property of the Atlantic & Pacific Railroad Company (Western division), was duly placed in the hands of receivers appointed by this court in proceedings pending therein to foreclose a second mortgage on said property, commenced by the Mercantile Trust Company of New York, to all of which proceedings
189 and records therein affiant makes reference; that immediately subsequent to this appointment, the receiver appointed took charge of said property, and run and operated the same, pay-

ing the taxes which they were advised were legally assessed thereon, up to and until the first day of February, 1896, when C. W. Smith, under an order made on the 10th day of January, 1896, in this action, took possession from the former receivers of all of said property, and continued to use and operate the same until the first day of July, 1897.

That during all of the time that all of the receivers above mentioned were in the possession and operation of said railroad property affiant was their duly appointed, authorized and acting attorney, having charge of the legal business of said property, under said receivers, as to the property in their hands, and the assessments and payment of taxes levied thereon.

Affiant further says that in 1892 the assessor of Valencia county, in the Territory of New Mexico, assessed the right of way of the Atlantic & Pacific Railroad Company and its station grounds in said county, at the aggregate sum of $327,103.00, and that there was extended against the assessment of the total property of said company in said county, for said year, the sum of $8,501.24; of this amount there was paid in due time by said railroad company, to the collector of said county, the sum of $1,089.65, being the taxes levied on the assessment of all other property of said company in said county excepting those levied upon the assessment of the right of way.

Affiant further says that about the first day of May, 1893,
190 as general attorney of said railroad company, affiant made an agreement with one Neill B. Field, who was then employed by the collector of Valencia county, having the unpaid taxes for 1892 in his hands for collection, whereby, in substance, it was agreed that affiant should bring an action to enjoin the collection of those taxes, in this court, for the purpose of having determined whether the right of way in said county and Territory, or any part thereof, was assessable for taxation, under the charter of the Atlantic & Pacific Railroad Company. That the railroad company through affiant, its general attorney, filed a bill in equity in this court, seeking to enjoin the taxes levied upon the assessment of said right of way in Valencia county, which said action was against the county of Valencia and Solomon Luna, sheriff and *ex officio* tax collector of said county; that thereupon a stipulation for the appearance of the defendants, signed by Neill B. Field, as their attorney, was filed in said cause; that thereafterwards, the district attorney of Valencia county filed a motion to have the acceptance of service by Mr. Field set aside, and pending said motion, by consent of all of the parties, said appearance was withdrawn; afterwards, in March, 1894, W. H. Whiteman, district attorney of Valencia county, filed his pleas in said cause; that, so far as affiant's recollection is concerned, said cause is still pending and undisposed of beyond that which is herein stated, but affiant refers to the files in said cause for a correct statement of its condition.

That on or about the 4th day of January, 1894, the Mercantile Trust Company of New York having filed its bill of complaint in this court against the Atlantic & Pacific Railroad Company,
191 to foreclose the second mortgage upon the property thereof, this court duly appointed J. W. Reinhart, John J. McCook

and Joseph C. Wilson, receivers of all of the property of said company, and such receivers immediately took possession thereof, and that they and their successors in office retained possession thereof until the same was turned over to the said Smith on February 1st, 1896; that subsequently, in that cause, and while this court, through its receivers, had possession of all the property of the Western division of the Atlantic & Pacific Railroad Company, Solomon Luna, as sheriff and *ex officio* collector of the county of Valencia and Territory of New Mexico, filed an intervening petition in said cause, about the 4th day of June, 1894, to collect the taxes levied upon the right of way of said railroad company in Valencia county for the year 1892, involved in the suit pending as aforesaid, and also for the year 1893; subsequently, and on December 14, 1894, the said Solomon Luna filed an amended petition in said cause, and thereafterwards the receivers filed in said cause certain pleas to said amended intervening petition, which were subsequently set down for argument, but as affiant is informed and believes, were never disposed of, and that the same is still pending in said court undisposed of.

That after the commencement of this action and the appointment of Mr. Smith as receiver, the receivers appointed in the other action of foreclosure surrendered to Mr. Smith on the first day of February, 1896, the property in their custody; afterwards, and about April 10, 1896, a decree of foreclosure was rendered in this cause,
ordering the sale of the property of the Western division of
192 the Atlantic & Pacific Railroad Company, and on the 3d day of May, 1897, said property was sold, under said decree of foreclosure, to Aldace F. Walker, R. Somers Hays and Victor Morawetz, and on the 4th day of May, 1897, said sale was duly confirmed by this court and a deed ordered to be made to the purchasers; that on the 2d day of June, 1897, the special master appointed by said decree, and who made the sale of said property, executed and delivered to the purchasers thereof a deed of conveyance of said property.

That in March, 1896, the Territory of New Mexico intervened in this cause for the purpose of collecting certain taxes claimed upon an alleged assessment of the right of way of the Atlantic & Pacific Railroad Company in the county of Bernalillo for the years 1893, 1894, and 1895, and that issue was joined upon such proceedings and a decree finally rendered in this court ordering the receiver to pay the taxes for those years; that subsequently an appeal was taken from this decree to the supreme court of the Territory of New Mexico, and in December, 1896, the supreme court of the Territory decided in said cause that the right of way of the Atlantic & Pacific Railroad Company was exempt from taxation in the Territory of New Mexico; that in the month of March, 1897, an appeal to the Supreme Court of the United States from said decision was duly taken and perfected; that after said decision, and after the sale and conveyance of said property under the decree of foreclosure, to the purchasers thereof, and about the 10th day of June, 1897, the intervening petition herein was filed; that affiant, believing that there was

no doubt or question concerning the exemption of the entire
193 right of way of the railroad company in Valencia county, and of the superstructure built thereon, under the act of Congress approved July 27, 1866, and the decision of the supreme court of the Territory of New Mexico referred to, was anxious to have the question, so far as Valencia county was concerned disposed of in the most expeditious manner, and therefore affiant as attorney for the receiver, and as attorney for the United States Trust Company (in that particular matter only), filed the certain pleas therein which appear in the files of this court. That while in affiant's judgment the intervening petition filed did not state facts sufficient to constitute any claim against the receiver, the receiver having instructed affiant that it was very important to get everything closed up so that he might be discharged from further duties in connection with said cause at the earliest possible moment, affiant for said receiver, and for said trust company, which then had as affiant is informed and believes no interest in the matter whatsoever, determined to have the matter disposed of as quickly as possible and therefore arranged with the counsel claiming the right to act for the Territory, and with the judge of this court, to have said matters disposed of on or about the 23d day of June, 1897, upon the filing of the pleas aforesaid.

Affiant further says that at the time of the filing of the bill of interplea herein, affiant had no knowledge, information or belief as to whether or not any of the right of way of the Atlantic & Pacific Railroad Company in Valencia county was right of way that was acquired from, or over land owned by others than the Government of the United States at the time of its acquisition, except that
194 affiant had been informed by the verified amended petition of Solomon Luna, filed in the Mercantile Trust Company case herein referred to, that there were some 60 miles of this right of way in Valencia county which he, Luna, claimed was acquired from others than the Government of the United States, and except as the maps issued by the Interior Department at that time, and since 1880, apparently disclosed upon their face that the line of railroad in controversy was located over certain grants for about the distance of 58 miles.

Affiant further says that at that time, and under the circumstances of the situation, and believing that it made no difference so far as the exemption claimed was concerned as to whether the right of way was acquired from public domain, or from persons other than the United States Government, for the purposes only of the pleas filed, and not as a matter of answer, admitted the claim made by the Territory as to the right of way acquired over land belonging to others than the Government of the United States to the extent the same was apparently warranted by the Government maps referred to in order to raise the question as to whether that would make any difference concerning the exemption, under the decision of the supreme court of the Territory, in the Bernalillo County case, and thereupon affiant took the maps of New Mexico, published by the Interior Department since 1880, and measured, approximately

the length of railroad as it was apparently located over that portion of Valencia county marked upon such maps as being covered by Mexican grants, and found that the right of way was approximately, as near as affiant could determine from such maps, located over
195 some 58 miles of such grants, as shown upon such maps, but affiant did not then have any knowledge, information or belief as to whether, as a matter of fact, or as a matter of law, or as a matter of fact and law, that the right of way located over these alleged grants, or over any one of them, was acquired from the Government, or from the grant-owners, or persons claiming under them, or any of them, and admitted the fact to such pleas that there was 58 miles of right of way over land acquired from others, simply for the purpose of raising the legal questions to be presented by the pleas in which such admissions were made, and not for the purpose of making the same as an admission of fact in an answer, or upon the record.

That since the decision of the Supreme Court of the United States herein, affiant has caused a careful and complete investigation to be made of the records of the Atlantic & Pacific Railroad Company during its possession and ownership of the said property, and of the Government of the United States, to ascertain, if possible, whether any right of way was acquired in Valencia county from any persons or person, or corporations other than from the United States Government and affiant further says that, from such investigation affiant believes that none of the right of way of the Atlantic & Pacific railroad in Valencia county, New Mexico, was ever acquired from any person or persons, or corporation, or community, other than from the Government of the United States, except only, perhaps, a very little portion acquired from the Laguna Indians, the exact amount of which affiant is now unable to state, except that it does
196 not amount in affiant's judgment to the extent of a mile, and except, probably, further portions over certain Pueblo Indian lands, concerning which affiant is in doubt.

Affiant further says that from the information and belief, based upon the result of the investigation he has had made, he believes that at the time of the definite location of the Atlantic & Pacific railroad through Valencia county, which was made in the year A. D., 1872, the entire line was located upon what was then, so far as the Atlantic & Pacific Railroad Company, the Territory of New Mexico and the United States was and were concerned, public domain of the United States, all of which was then unsurveyed, and none of which was in the possession of any one else, except those portions in the possession of the Indians, and that by such location the Atlantic & Pacific Railroad Company acquired, as of the date of July 27th, 1866, the title to its entire right of way in Valencia county from the Government of the United States and from no other source, except a very small piece in the pueblo of Laguna, and except, possibly, a further portion over certain Indian lands.

Affiant further says that if he is mistaken in his judgment that it would be impossible for any person, as he believes, in advance of a decision of a competent court, to determine correctly what portion, if

any, of the line of right of way of the Atlantic & Pacific Railroad Company in Valencia county was acquired from any other person, or persons, communities or corporations, other than the United States.

Affiant further says, upon his information and belief, that it would be impossible for any one now to give the exact mileage of
197 the right of way of the Atlantic & Pacific railroad in Valencia county over lands, the title to which is now in some person, or persons, corporations or communities other than the United States, through these Mexican grants or otherwise.

Affiant further says, upon his information and belief, that while the line of the right of way of the Atlantic & Pacific railroad in Valencia county is apparently located across about eight Mexican grants, not one of these grants were surveyed, or the boundaries thereof known, fixed or determined, at the time of the definite location of the said line of right of way, and only two of them were surveyed, fixed and determined prior to the building of the road, and two or three of them are yet unsurveyed.

Affiant further says, upon his information and belief, that there is not a person living who could, without accurate surveys, determine in any way accurately the mileage of the Atlantic & Pacific railroad over any one of these Mexican grants, or give any practical description of the same.

Affiant further says, upon his information and belief, that the railroad built by the Atlantic & Pacific Railroad Company was built by it upon the line of definite location as made by it in 1872, in said Valencia county.

Affiant further says, upon his information and belief, that some of the grants over which the line of the Atlantic & Pacific railroad was apparently located have been surveyed, but the surveyor general of New Mexico has not made the same public, for that the fees for the surveys have not been paid and that practically, as affiant is informed and believes, one-half of the mileage of the Atlantic
198 & Pacific railroad over Mexican grants in said county is in this condition, so that it would be impossible for any one to obtain the mileage of the right of way over such grants.

Affiant further says, upon his information and belief, that not one of these Mexican grants, over which the said line of railroad is apparently located in Valencia county, New Mexico, were grants made by metes and bounds, or by any survey or description other than by locations by natural and artificial points and objects, as they existed from one to two hundred years previous, so that, in affiant's judgment, it would be impossible, in advance of a survey made and settled by some competent authority, to tell where all of the lines of any of these grants were crossed by said line of railroad in said county.

Affiant further says that, upon his information and belief, no right of way was acquired by the Atlantic & Pacific Railroad Company in Valencia county, New Mexico, by the exercise of the right of eminent domain, or by any condemnation proceedings instituted under the charter of the Atlantic & Pacific Railroad Company, or

the laws of New Mexico, or the laws of the United States, and that no right of way was acquired in said county and Territory by purchase from any person or persons, or corporation, save and except possibly the small piece referred to by purchase from the Laguna Indians; and that said railroad was constructed through Valencia county between the years 1880 and 1883, the exact date of which affiant is now unable to state.

Affiant further says, upon his information and belief, that neither the Atlantic and Pacific Railroad Company nor its receivers,
199 nor the Government of the United States, nor the Territory of New Mexico have ever prior to the proceedings in court referred to herein in any way claimed, or contended, or assumed that any portion of the right of way in Valencia county, New Mexico, of the Atlantic & Pacific Railroad Company, was ever acquired from any one but the Government of the United States. That although the railroad was built and constructed at the time stated, no effort or attempt was ever made by any one to claim for the purposes of taxation, or otherwise, that any portion of said right of way was acquired by the railroad company in Valencia county from any one else than from the Government of the United States until the petition filed by Solomon Luna in the Mercantile Trust Company case referred to was filed.

Affiant further states that since the decision of the Supreme Court of the United States in this case it has been deemed advisable to raise legal questions which were not heretofore considered by affiant necessary to be raised in said cause by reason of the facts stated herein.

Affiant further says that the application of which this affidavit is a part is not made for any purpose of delay, but is made by affiant in absolute good faith.

Affiant further says, upon his information and belief, that F. W. Clancy, solicitor for the intervening petitioner in this cause, has not now and never has had authority to file any intervening petition in said cause, for and on behalf of the Territory of New Mexico, save and except only that said F. W. Clancy was employed by the county
of Valencia to collect or assist to collect the taxes alleged to
200 be due in said intervening petition, under a contract of employment made between the said F. W. Clancy and the board of county commissioners of Valencia county in the spring of 1897.

Affiant further says that he never knew, until within the past six months that the said F. W. Clancy was only authorized to proceed in the name of the Territory by the action of said county commissioners of Valencia county.

Affiant further says that he is informed and believes that the said F. W. Clancy was never authorized by any district attorney of Valencia county, or by the attorney general of New Mexico, to commence any proceedings, or to file any petition in intervention in the name of the Terrritory of New Mexico, relative to said matter.

Affiant further says that he always assumed that the said Clancy was authorized to use the name of the Territory in said matter until he has learned within the last six months by correspondence with the

attorney general of New Mexico that the said F. W. Clancy was not authorized to file such plea in the name of said Territory by the attorney general of New Mexico.

Affiant further says, upon his information and belief, that neither the late receiver, as such receiver appointed in this cause, nor the United States Trust Company of New York, have any real interest whatever in the property alleged in the intervening petition to have been assessed, or in the payment of taxes claimed to be due thereon to the Territory of New Mexico or the county of Valencia by reason of the facts stated herein, and shown by the records and files in this cause.

201 Affiant further says that as of the date of the 2d day of June, 1897, the special master in the above-entitled cause, O. N. Marron, in accordance with the decrees made in said cause, made, executed and delivered a deed of conveyance of all the property covered by the decree of foreclosure and the decree of confirmation to Aldace F. Walker, R. Somers Hayes and Victor Morawetz, purchasers at the sale under the decree. That subsequently, and about the 22d day of June, 1897, the said purchasers last above named executed and delivered a deed of conveyance of the property so conveyed to them to the Santa Fe Pacific Railroad Company, a corporation duly incorporated under act of Congress approved March 3, 1897. That on the 1st day of July, 1897, the said C. W. Smith, as such receiver, delivered the possession of all the property sold under the decree of foreclosure in this court at the sale which was duly confirmed as aforesaid, to the Santa Fe Pacific, which had at that time received a deed of conveyance therefor from the purchasers at said sale, and that the said C. W. Smith, as such receiver, has not since the first day of July, 1897, had possession or control of any of the property sold at said sale under said decree.

Affiant further says upon his information and belief, that since January 1, 1898, the said C. W. Smith, as such receiver, has not had in his possession or under his control, in any way, shape or manner, any property of any kind, nature or description, or any money or assets which ever at any time came into his possession, custody or control by virtue of the order appointing him receiver in this cause.

C. N. STERRY.

202 Subscribed and sworn to before this 26th day of September, A. D. 1899.

HARRY P. OWEN,
Clerk District Court, Second Judicial District, New Mexico.

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW York, Complainant,
vs.
THE ATLANTIC & PACIFIC RAILROAD Company *et al.*, Defendants.
} In Equity. No. 1122

In the matter of the intervening petition of the Territory of New Mexico in the above-entitled cause to collect certain taxes alleged to be due in Valencia county, New Mexico.

TERRITORY OF NEW MEXICO, *County of Bernalillo,* } *ss:*

C. N. Sterry, being first duly sworn, deposes and says: That the taxes claimed to be due by the intervening petition herein was never presented to, or the payment thereof demanded from the purchasers of the property sold under the decree in this cause, or their assigns, and that neither the purchasers nor their assigns have ever refused any payment of such taxes or any part thereof upon any demand or claim for the same upon them, or either of them by the Territory of New Mexico. That no notice was ever given to the purchasers, or their assigns that any intervening petition would be filed in this cause for or on behalf of any such taxes prior to the filing of the same, except that F. W. Clancy, at the time the confirmation of the sale was pending, notified the purchasers, their solicitor and
203 the court that he had been employed by Valencia county to collect taxes claimed to be due, and that he wished the decree of confirmation of the sale of the property so formed that if he obtained a valid judgment for such taxes it would be a lien upon the property sold in the hands of the purchasers. That the possession of the property sold under the decree was delivered by the receiver to the assigns of the purchasers, the Santa Fe Pacific Railroad Company on July 1st, 1897. And further affiant saith not.

C. N. STERRY.

Subscribed and sworn to before me this 27th day of September, A. D. 1899.

[SEAL.]

HARRY P. OWEN,
Clerk District Court, Second Judicial District, New Mexico.

That on, to wit, the said 27th day of September, 1899, there was filed in the office of the clerk of said court in said cause, an affidavit of F. W. Clancy, which affidavit is in the words and figures following, to wit:

In the District Court, Second Judicial District, September Term, 1899.

UNITED STATES TRUST COMPANY OF NEW YORK
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY ET AL.

In the matter of the intervening petition of the Territory of New Mexico to enforce the payment of taxes due in Valencia county.

TERRITORY OF NEW MEXICO,
County of Bernalillo.

Frank W. Clancy, being duly sworn, on his oath says that he is a practicing attorney by profession and has been employed as
204 special attorney and counsel for the prosecution of the said claim of the Territory of New Mexico for taxes due upon the railroad property formerly belonging to the said Atlantic and Pacific Railroad Company; that he has been a member of the bar of New Mexico ever since the month of September, 1874, and has been engaged in active practice nearly all of the time; that he is well aware that many of the statements and allegations which he proposes to make in this affidavit would not be ordinarily proper and he makes them only because there is no other way to answer upon the record in this proceeding the statements made by C. N. Sterry in his affidavit which is intended to be filed herein in support of a motion to dismiss the said intervening petition, the affidavit of the said Sterry being made up in large part of statements of fact based upon hearsay or conjecture and of matter of opinion, judgment and belief concerning questions of law, instead of being confined to allegations of fact.

Affiant further states that he believes the allegations in the affidavit of the said Sterry as to his employment by the Atlantic and Pacific Railroad Company, and by the receivers of the property of said company, and as to his residence in Albuquerque, are true; but affiant denies that during all of the time from 1892 to 1896 the said Sterry made the returns required by the laws of said Territory of the property of the said railroad company for assessment, or that he prepared and paid the taxes which were legally levied upon said property.

Affiant denies, as alleged by said Sterry in his said affidavit, that in 1892 the assessor of Valencia county assessed the right of way of
205 the said railroad company and its station grounds in said county at the aggregate sum of $327,103; but avers that the said assessor, on the assessment-roll for 1892 did assess the "total value of right of way" at the amount aforesaid, and that the said assessment was based upon a return made by the said Sterry on the 19th day of April, 1892, in which he stated the full value of the said right of way and of the superstructure thereon, composing the road-bed, track and railroad of said company, together with the telegraph line erected on said right of way, at the sum aforesaid; and that the said assessor assessed the grounds for station buildings

and for other purposes together with the improvements thereon, at the sum of $11,782 and that such assessment was based upon the same return made by the said Sterry.

Affiant further says that as to any agreement in 1893 or at any other time between the said Sterry and one Neill B. Field as to the unpaid taxes for 1892, he has no knowledge, information or belief, nor as to whether in consequence of any such agreement any suit in equity was filed for the railroad company to enjoin the taxes levied upon the assessment of said right of way in Valencia county; and affiant avers that the docket of this court does show a case numbered 997, brought on behalf of said railroad company against the county commissioners of Valencia county and against the sheriff and *ex officio* collector of said county, on the 1st day of November, 1893, that the plea of the board of county commissioners was filed in said cause on the 9th of March, 1894, and that on the 15th of March, a motion was filed to set the said plea down for argument and that thereafter nothing appears to have been done in
206 said cause; that affiant is unable to make any statement as to the nature or character of said suit as the papers therein appear to have been withdrawn from the files of this court for the said Sterry by one of his employés on the 15th of September, 1899.

Affiant admits, as alleged by said Sterry, the appointment of receivers in a cause brought by the Mercantile Trust Company of New York, which is numbered 999 on the docket of this court, and also that Solomon Luna, as sheriff and *ex officio* collector of the county of Valencia, filed an intervening petition in said cause upon the 4th day of June, 1894, seeking to collect the taxes levied, not upon the right of way as alleged by the said Sterry in his said affidavit, but upon the property of the Atlantic and Pacific Railroad Company for the years 1892 and 1893; and that subsequently, on the 14th day of December, 1894, the said Solomon Luna filed an amended petition in said cause, and that afterwards the receivers filed in said cause certain pleas to said amended intervening petition; but affiant denies that the said petition and pleas are still pending in this court undisposed of, and states that the said suit of the Mercantile Trust Company has been fully and finally disposed of and that said intervening petition and the pleas thereto have gone out of court with the main suit to which they were merely ancillary; that upon the appointment of Charles W. Smith as separate receiver of the property of the Atlantic and Pacific Railroad Company, this court parted with all control over said property in the said Mercantile Trust Company case and was therefore powerless to proceed in said suit with regard to the said intervening petition of the said Solomon Luna.

207 Affiant admits that upon April 10th, 1896, a decree of foreclosure was rendered in this cause, and that on the 3rd day of May, 1897, the property of the Western division of the Atlantic and Pacific Railroad Company was sold, under said decree, to Aldace F. Walker, R. Somers Hayes and Victor Morawetz; that on the 4th day of May, 1897, the said sale was confirmed by this court and a deed ordered to be made to the purchasers and that thereafter a

deed was made as of the date of the 2nd day of June, 1897, by the special master, O. N. Marron; but affiant avers that the said deed was not filed for record in the office of the recorder of deeds of Bernalillo county until the 12th day of June, 1897.

This affiant admits that there were proceedings begun by the Territory of New Mexico in 1896 for the recovery of taxes upon the property of the Atlantic and Pacific Railroad Company in the county of Bernalillo for the years 1893, 1894 and 1895, but he denies that the said proceedings or the decrees therein are accurately stated in the said affidavit of the said Sterry and declares that, in his judgment and opinion, it is quite immaterial to the present proceeding what may have been done in the case as to taxes in Bernalillo county. Affiant admits, as is shown by the records of this court, that on the 10th day of June, 1897, the intervening petition in this proceeding was filed; and affiant states in connection herewith, that the additional assessments set up and referred to in said intervening petition, copies of which were filed therewith as parts thereof, were made by the collector of Valencia county on or about the 7th day of June, 1897; that the said additional assessments were made by the said collector because there had been no assessment made for either of the years from 1892 to
208 1896, of the property described and set forth in the said additional assessments, especially as to the improvements upon the land embraced within the limits of the right of way of the railroad company, the previous assessments having been in terms only of the "total value of the right of way;" and their validity having been disputed on that ground as well as others, by the said Sterry; and also for the purpose of discriminating between the improvements on the right of way where the same runs over what was public domain of the United States when the right of way was granted and the improvements upon the right of way where it runs over land which was held in private ownership at the time of said grant. Affiant further states that the said intervening petition was immediately served on the said C. N. Sterry, by leaving a copy thereof at his office in Albuquerque, New Mexico, together with copy of the order of this court for parties to show cause against the said petition on the 15th day of June, 1897; and on the same day, that is to say, on the 10th day of June, 1897, affiant wrote to the said C. N. Sterry, who was then in Los Angeles, in the State of California, calling his attention to the matter and asking him to expedite it. Affiant further says that at the time of the making of said additional assessments, he directed the said collector to give notice of the same to the said Sterry and to the receiver of the railroad company, and also as he now recollects to the counsel of the United States Trust Company, and he has been assured by the said collector that the said notices were mailed as directed by affiant.

209 Affiant further states that under the law of New Mexico the board of county commissioners of Valencia county was required to hold two sessions in each year as a board of equalization of taxes, one on the first Monday of June and the other on the first Monday of July, so that the said Sterry had ample opportunity if

he so desired to appeal from the said additional assessments to the said county board of equalization.

Affiant further states that in the order of confirmation of the sale hereinbefore referred to, made by this court, there was inserted a provision that the sale was made upon the express condition that the purchasers or their successors or assigns, should pay any taxes which might finally be adjudged to be a lien upon the property sold under the decree aforesaid, and other provisions were inserted in said order of confirmation by which jurisdiction was retained by this court for the purpose of enforcing the provisions of the decree of foreclosure and of said decree of confirmation and full compliance with all the terms, conditions and provisions of both of said decrees.

Affiant further states that this proceeding is in the nature of a proceeding *in rem* against the property upon which taxes have been levied; that the purchasers at said foreclosure sale and their successor and assign the Santa Fe Pacific Railroad Company, took their conveyance of the said property with full notice and knowledge of the claims of the said intervening petitioner for such taxes as aforesaid.

Affiant further states that at the time of the filing of said intervening petition herein, the said Sterry certainly had sufficient knowledge, information and belief to enable him to state as to whether or not any of the right of way of the Atlantic
210 and Pacific Railroad Company in Valencia county ran over land owned by others than the Government of the United States at the time of its acquisition. because on the 6th day of February, 1895, the said Sterry in verifying pleas of the former receivers to the amended petition of Solomon Luna hereinbefore referred to filed in the case numbered 999 on the docket of this court, declared under oath that each of the said pleas were true in point of fact, and in the said pleas it was asserted positively "that about 58 miles of said right of way in said county and Territory was and is through land which was not Government land, but which belonged to private individuals or corporations and was acquired by the railroad company under and through the rights conferred upon it by said act of Congress;" and "that the balance of said right of way was and is over and upon public lands of the United States." Affiant further states that the same allegation is made in the same language in the pleas to the intervening petition on file in the present proceeding. Affiant further states that the same admissions upon their face appear to be, and cannot reasonably be otherwise construed than as deliberate and careful statements of a fact peculiarly and necessarily within the knowledge of the said railroad company, of said receivers and of their officers and employés and that their effect cannot be avoided by any present declaration of the said Sterry as to what he may have had in his mind at the time of making said admissions; that it was not at all necessary to the raising of the questions which he declares in his affidavit that he desired to have adjudicated and settled that he should have made such admissions with such positiveness and exactness. Affiant further states
211 that the said railroad company, and every person or corporation in privity therewith have been fully informed from time

to time of the construction of its line of road over lands which were not public domain at the time of said grant, that those lands were held in private ownership, because the Land Department of the Government has refused to survey or patent to the said railroad company any of the alternate odd-numbered sections of land which fall within the so-called grants which were so held in private ownership, and the said railroad has never attempted to sell or convey any of such lands.

Affiant further says that as a result of investigations which he has made, of his general knowledge of the country and particularly of the ownership and possession of the several tracts of land in Valencia county which are not and never have been portions of the public domain, and over which it is claimed that a little over sixty miles of the railroad in question have been constructed, that the entire line of said railroad was not, in 1872, located upon what was then so far as the railroad company, the Territory and the United States were concerned, public domain of the United States, but on the contrary affiant asserts that the grants aforesaid were at that time in the open, notorious, visible possession of persons claiming ownership therein and living thereon; that some of said grants had been confirmed long before 1866 by Congress and they were in the actual possession of the confirmees who are Pueblo Indians; that the remainder of said grants have all been confirmed by the court of private land claims and in each case the title has been by said court declared to have been complete and perfect prior to the
212 acquisition of this country by the United States.

Affiant further states that the said Sterry is entirely mistaken in his assertion that it is impossible for any person to determine correctly what portion of the line of right of way of the railroad company in Valencia county was acquired otherwise than from the United States, or that it would be impossible for any one now to give the exact mileage of such right of way over such lands.

Affiant further states that all of the right of way of said Atlantic and Pacific Railroad Company in Valencia county, New Mexico, over the grants hereinbefore referred to was acquired by the said railroad company by virtue of the provisions of section 7 of the act of Congress incorporating the said Atlantic and Pacific Railroad Company, by which the company was authorized to enter upon, purchase, take and hold any lands that might be necessary for the construction of its road and by which all claims to damages for such appropriation of land are barred in case no claimant appears within six years from the time of the opening of said road across any land; and while it is true that the said company did not institute any proceedings for the condemnation of said lands in the said grants, yet no application was made by the owners of said land for the appointment of appraisers and the assessment of damages, and the only way in which said company can show title to any of said lands is by reason of the six-years bar declared in said section of said act of Congress.

Affiant further states that he has made examination of plats and maps in the office of the surveyor general of New Mexico and of a

map prepared for and used by the said Atlantic and Pacific
213 Railroad Company in connection with its land-grant business, and from such examination he is able to state with a near degree of approximation the amount of railroad of the said Atlantic and Pacific line which passes over said grants as aforesaid; that the said railroad line where it passes from Bernalillo county into Valencia county at a point more than four miles southwest of the Isleta junction enters upon land embraced within the limits of a tract known as the Joaquin Sedillo grant, which it crosses in a southwesterly direction and then enters upon an adjoining tract known as the Antonio Gutierrez grant, the extent of the line across the said two grants being about four miles; that these two grants were, in June, 1897, confirmed by the court of private land claims, which decreed that the title thereto was complete and perfect at the date when the United States acquired sovereignty over the country now embraced within the Territory of New Mexico.

Affiant further states that where the said line of road leaves the Antonio Gutierrez grant, it enters the San Clemente grant or the grant of Los Lunas, which it traverses in a southwesterly direction until it reaches the north line of Nicolas Duran de Chavez grant which it enters for a very short distance, turning to the westward near the line between the two grants and returning into the San Clemente grant, from which it passes at its western boundary on the Rio Puerco; that the length of said line from the place where it enters the San Clemente grant to the point where it finally leaves that grant on the Rio Puerco is about thirteen miles; that both of said
grants have been confirmed by the court of private land
214 claims, the San Clemente in September, 1896, and the other in August, 1893, and in each case the court by its decree declared the title to have been complete and perfect at the date when the United States acquired sovereignty over the country embraced within the Territory of New Mexico.

Affiant further states that where the railroad crosses the Rio Puerco it enters upon the Antonio Sedillo grant which it crosses in a northwesterly direction for a distance of about thirteen miles; and that this grant was confirmed by the court of private land claims in 1892, the decree of that court declaring that the title in the original grantee, Antonio Sedillo was a complete and perfect title.

Affiant further states that at a considerable distance northwest of the Antonio Sedillo grant, said railroad enters upon lands belonging to the Indian pueblo of Laguna and traverses three pieces of land known as the Laguna purchases numbers 2, 3 and 4, claims for which were confirmed by Congress on the 21st of June, 1860, the length of said line through said three tracts being about six and one-half miles.

Affiant further states that the said railroad upon leaving the last-mentioned tracts, enters upon the Laguna Pueblo grant, which it traverses for a distance of about six and three-fourths miles and that this grant was confirmed by the court of private land claims in October, 1897, the court by its decree declaring the title to have

been complete and perfect at the date of the treaty of Guadalupe Hidalgo.

Affiant further states that some distance to the west of the Laguna Pueblo grant, said railroad enters a small tract of land known as the Laguna purchase No. 5, which was also confirmed by
215 Congress on the 21st of June, 1860, and passing from said Laguna purchase number 5, the railroad enters the Acoma Pueblo grant which was confirmed by Congress in 1858, the length of the said railroad through the Laguna purchase No. 5 and the Acoma grant being about fourteen miles.

Affiant further states that while he is not able to state with absolute accuracy the length of said line of road through said grants he believes that there can be no doubt that the railroad company in possession of said line of road, can from its own close and accurate surveys of its line of road, taken in connection with the public land surveys and with the surveys already made of said grants, determine positively and accurately, certainly within a very small fraction of a mile, just how much of said line of road lies within the said grants.

Affiant further states that the Atlantic and Pacific Railroad Company, its officers and employés have from the time of the construction of said road in every way recognized the fact of the private ownership of all of the land embraced within the said grants as is shown by maps made by them and by conveyances which they have made of portions of its land grant.

Affiant further states that, as solicitor for the intervening petitioner, he has now and always has had, from the beginning of this proceeding, authority to file the said intervening petition on behalf of the Territory of New Mexico; that by an act of the legislative assembly of the Territory of New Mexico, which was adopted March 5th, 1897, county commissioners of any county interested in prosecuting any suit or proceeding at law or in equity for the collec-
216 tion of taxes levied and assessed by it or the Territory of New Mexico, were authorized to employ special attorneys and counsel for the prosecution of such suit, and by said act an appropriation was made from the territorial treasury to pay certain expenses which might be incurred in the prosecution of any appeals or writs of error from the supreme court of the Territory; that by virtue of the authority conferred by said statute, the county commissioners of the county of Valencia employed affiant for the purpose of prosecuting this proceeding; that the suggestion contained in the affidavit of said Sterry that affiant has no lawful authority to prosecute this case because not authorized by any district attorney or by the attorney general, is of no value, as such a doctrine might practically nullify the intention of the legislative assembly and deprive the county commissioners of all power to exercise the authority conferred upon them by said statute.

Affiant further states, however, that in the present case when it was pending in the supreme court of the Territory of New Mexico in 1897, the then solicitor general of New Mexico, its chief law officer entrusted with the conduct of its business in said supreme court,

recognized the propriety and validity of affiant's employment and of his right to appear in this case, by filing in said supreme court an assignment of error to which he signed his name as such solicitor general aforesaid, and also the name of this affiant as of counsel; but affiant insists that such recognition by said solicitor general was not at all necessary to the validity of his employment and to his right to prosecute this proceeding and that to ask or insist
217 upon the dismissal of this proceeding upon any such ground after having litigated the matter for more than two years without raising such question is an attempt to evade the payment of a just tax and obligation upon the flimsiest kind of a technicality.

Affiant further states that the fact that the said Charles W. Smith as receiver has not in his possession or under his control any property which came into his possession as such receiver, or that the United States Trust Company of New York has no interest in this proceeding, is entirely immaterial, as the object of this proceeding is to establish the validity of taxes which have been levied upon property now belonging to the Santa Fe Pacific Company, and formerly the property of the Atlantic and Pacific Railroad Company; that the said Santa Fe Pacific Railroad Company has made itself a party to this suit as will be seen by reference to its petition filed December 19, 1898, and is represented by the said C. N. Sterry as its chief law officer and is chargeable with knowledge and notice of all proceedings under this intervening petition, and, upon the establishment of the validity of said taxes, can by this court properly be required to pay the same in view of the provision hereinbefore referred to contained in the decree of confirmation of the sale by virtue of which the said last-mentioned railroad company now holds said property.

FRANK W. CLANCY.

Subscribed and sworn to before me this 26th day of September, A. D. 1899.

[SEAL.] HARRY F. LEE,
Notary Public.

218 That on, to wit. said 27th day of September, 1899, there was filed in the office of the clerk of said court, in said cause, another affidavit of F. W. Clancy, which said affidavit is in words and figures following, to wit:

In the District Court, Second Judicial District, Territory of New Mexico.

UNITED STATES TRUST COMPANY OF NEW YORK
vs.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY ET AL.

In the matter of the intervening petition of the Territory of New Mexico to enforce payment of taxes due in Valencia county.

TERRITORY OF NEW MEXICO,
County of Bernalillo.

F. W. Clancy, being duly sworn, on his oath says, that since the making of the previous affidavit in this cause he has been served with a copy of an amended motion to dismiss the intervening petition herein, which sets up an additional ground for such motion, said ground being that which is set forth in the third paragraph of said amended motion. Affiant states that at the time of the presentation to this court of the report of the foreclosure sale in this cause and the asking of a confirmation of said sale, he attended before the court for the purpose of having inserted in the order of confirmation a provision that the sale was made subject to the payment by the purchasers or their successors or assigns of any unpaid taxes which might be adjudged to be a lien upon the property sold; that at said time there were present Mr. Aldace F. Walker and Mr. Victor Morawetz, two of the purchasers at said sale, and perhaps
219 Mr. R. Sommers Hayes, the third purchaser, but of this affiant is not now certain; there were also present Mr. C. N. Sterry and Mr. E. D. Kenna, who was and is, as affiant understands, the principal law officer of the whole Santa Fe system of railroads; that at said time and place affiant stated that arrangements had been made for his employment by the counties of Bernalillo and Valencia, under authority of an act of the legislative assembly of 1897, for the purpose of prosecuting claims against the property sold for taxes which had been levied for four or five years in said counties, the validity of which was in dispute, the railroad authorities claiming that the congressional exemption set out in the second section of the act of Congress of 1866, incorporating the Atlantic and Pacific Railroad Company, extended to the property upon which the taxes had been levied; that a long discussion ensued, in the course of which affiant distinctly recollects that it was urged by some of the gentlemen present that the decree of foreclosure had said nothing on the subject of unpaid taxes and that it was not fair to the purchasers to saddle them with any additional liability in the order of confirmation, to which affiant replied in substance that if the purchasers had been misled or deceived by the decree of foreclosure it was not too late for them to recede from their purchase and refuse to take the property if additional and unexpected burdens were imposed; that in answer to a suggestion made as affiant now recollects, by Mr. Kenna, that if the taxes were a lien on the property that lien could not be divested by the sale of the prop-

erty, affiant answered in substance that in his opinion this was true, but he desired to have inserted in the order of confirma-
220 tion such a provision as he asked so that it would be impossible for the purchasers at any future time to set up that they had made the purchase without notice of the existence of such claimed taxes and thus to eliminate one possible point of dispute or discussion in any later proceeding. Affiant further states that as a final result of the said discussion and by agreement of the counsel present there was inserted in the said order of sale such a provision as he asked, in language drafted by Mr. Kenna, approved by affiant and assented to by the purchasers present, that clause being in the words following, to wit: "including also any taxes which may finally be adjudged to be a lien upon the property and sold under the decree aforesaid." Affiant further says that in the original order of confirmation on file in this court which is in print, the language above quoted will be found written with a pen on the margin of page seven, with marks indicating that it should be inserted after the words "date of payment" in the paragraph beginning "subject however, to the express condition."

FRANK W. CLANCY.

Subscribed and sworn to before me this 27th day of September, A. D. 1899.

[SEAL.] HARRY F. LEE,
Notary Public.

That the above four affidavits and the files in said cause was all the evidence heard or considered by the court upon the hearing of that motion.

That on, to wit, the said 27th day of September, 1899, there
221 was made and entered of record in said cause, an order overruling amended motion to dismiss the intervening petition of the Territory, which said order is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW York, Complainant, *vs.* THE ATLANTIC & PACIFIC RAILROAD COMPANY *et al.*, Defendants.	In Equity No. 1122

In the matter of the intervening petition of the Territory of New Mexico to collect certain taxes alleged to have been assessed in Valencia county, New Mexico.

Order.

This cause coming on to be heard at the regular September, 1899, session of this court, sitting for the trial and hearing of causes arising

under the Constitution and laws of the United States, the Territory of New Mexico, appearing by F. W. Clancy, Esq., its solicitor, and the late receiver, C. W. Smith, and the United States Trust Company of New York, appearing by their solicitor, C. N. Sterry, Esq., and thereupon the said C. W. Smith, as such receiver, and the said United States Trust Company of New York, jointly and severally, moved the court for leave to file an amended and substituted motion to dismiss the intervening petition filed in said cause by the Territory of New Mexico, which application for leave to file said motion, and the original motion to dismiss, was resisted by the intervening petitioner, and was, against the objection of said intervening petitioner, granted; and thereupon the said C. W. Smith, as such receiver, and the United States Trust Company of New York, having filed said amended motion to dismiss, the same came on for hearing, and upon a hearing thereof, there *was* introduced in evidence two affidavits of C. N. Sterry, filed herein, and, also, two affidavits of F. W. Clancy, filed herein, together with the files of this cause relevant thereto. That the above and foregoing was all the evidence heard upon the hearing of said motion. That thereupon argument of counsel having been heard, and the matter being duly considered, it was

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Ordered, adjudged and decreed, that said motion be and the same hereby is overruled, to which ruling the said C. W. Smith, as such receiver, and the United States Trust Company of New York jointly and severally, excepted.

J. W. CRUMPACKER, *Judge.*

September 27, 1899.

That on, to wit, the said 27th day of September, 1899, there was filed in the office of the clerk of said court, a plea in abatement, which said plea in abatement is in words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

United States Trust Company of New York, Complainant, *vs.* The Atlantic & Pacific Railroad Company *et al.*, Defendants.	In Equity. No. 1122.

223 In the matter of the intervention of the Territory of New Mexico in the above-entitled cause to collect certain taxes alleged to be due in Valencia county, New Mexico.

Plea in abatement to the further proceedings in this cause upon the intervening petition of the Territory of New Mexico to collect taxes alleged to have been levied in Valencia county, New Mexico.

The United States Trust Company of New York, and C. W. Smith, late receiver of the property of the Atlantic and Pacific Railroad

Company, jointly and severally, by protestation, not confessing or acknowledging all or any part of the matters and things in the intervening petition of the Territory of New Mexico to be true in such manner and form as the same are therein set forth and alleged, do plead in abatement of any further proceedings upon the intervening petition herein stated, the following facts, to wit:

1st. That the receiver, C. W. Smith, was, on or about the 26th day of April, 1898, discharged as receiver in said cause, and from that time to this, the said receiver has had no funds or property in his hands wherewith to answer any judgment that might be rendered against him as such receiver.

2d. That it appears from the files in the above-entitled cause that at the time of the filing of the intervening petition herein, all of the property in the hands of the receiver and in the custody of the court had been sold and conveyed to third parties under the decree of this court, who were not and have not been made parties
224 hereto.

3d. That the claims and demands set forth and stated in the intervening petition filed herein were never presented to the parties who purchased the property sold under the decree of foreclosure in this cause, or their assigns, and that no notice was ever given to such purchasers or their assigns that any such claim- or demands would be filed by the Territory of New Mexico in this cause, prior to the filing of the intervening petition herein, and neither said purchasers nor their assigns ever refused any payment thereof upon any demand or otherwise.

4th. That the United States Trust Company at the time of the filing of the said interplea had not and never since has had any interest in the subject-matter of this intervening petition as fully appears from the records and files in this cause.

5th. That the name of the Territory of New Mexico, as used in the intervening petition is without any right, leave or authority on the part of the party using the same.

6th. That no suit or intervening petition was ever authorized by any person or persons authorized to use the name of the Territory of New Mexico.

7th. That this motion will be based on the files in this cause and the affidavits of C. N. Sterry attached to the motion to dismiss, filed in this cause.

All of which several matters and things hereinabove stated and set forth the said United States Trust Company of New York, and the said C. W. Smith, late receiver, jointly and severally aver to be true, and they each jointly and severally plead the same to
225 the said intervening bill of complaint as an abatement to any further proceedings in this cause.

C. N. STERRY,
Solicitor and Counsel for Each of the Above-named Parties.

I hereby certify that the foregoing plea is, in my judgment well founded in point of law.

C. N. STERRY,
Solicitor and Counsel for Each of the Above-named Parties.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

C. N. Sterry, being first duly sworn, deposes and says: That he is the sole solicitor and counsel for the said C. W. Smith, as receiver, and the United States Trust Company of New York, in the proceedings in which the above and foregoing plea in abatement is filed. That the said C. W. Smith, receiver, resides at Pasadena, Los Angeles county, California, and that the United States Trust Company of New York has its residence and principal place of business in the city of New York, State of New York, and that neither one of said parties herein named to affiant's knowledge is within the territorial limits of the Territory of New Mexico at the time when this affidavit is made, or this plea in abatement filed. Affiant further says that the foregoing plea is not interposed for delay, and he believes the facts stated therein to be true.

C. N. STERRY.

Subscribed and sworn to before me this 27th day of September, A. D. 1899.

[SEAL.] HARRY P. OWEN,
Clerk District Court.

226 That on, to wit, the 27th day of September, 1899, there was made and entered of record in said cause an order, which said order is in words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW York, Complainant,
vs.
THE ATLANTIC & PACIFIC RAILROAD COMpany *et al.*, Defendants. } In Equity. No. 1122.

In the matter of the intervening petition of the Territory of New Mexico to collect certain taxes alleged to have been assessed in Valencia county, New Mexico.

Order.

Now, at this September, A. D. 1899, term of this court, for the hearing of causes arising under the Constitution and laws of the United States, the above-entitled cause coming on to be heard upon the application of C. W. Smith, late receiver, and the United States Trust Company of New York, for permission to withdraw the pleas heretofore filed on the 23d day of June, 1897, filed by the said C. W. Smith, as receiver, and the United States Trust Company of New York, to the intervening petition of the Territory of New Mexico and to file a plea in abatement thereto, and thereupon the

Territory of New Mexico appearing by F. W. Clancy, Esq., and the said C. W. Smith, receiver, and the United States Trust Company of New York, appearing by C. N. Sterry, Esq., their solicitor, the said application was presented to the court by counsel, and the court being duly advised in the premises,

227 Ordered that the said C. W. Smith, as such receiver, and the United States Trust Company of New York, be and they hereby are jointly and severally authorized to withdraw the pleas filed in said cause to the intervening petition on the 23d day of June, 1897, and they are each given permission to file a plea in abatement to said intervening petition at this time to all and each and every part thereof, to all of which the Territory of New Mexico duly and strenuously at the time objected and excepted to the order and ruling thereon; and immediately thereupon, the said C. W. Smith, as such receiver, and the United States Trust Company of New York, jointly and severally, filed a plea in abatement to said intervening petition (subsequent to the overruling of the motion to dismiss) which said plea in abatement was duly set down for argument and was by consent of the parties immediately taken up, argued by counsel and considered by the court, and upon argument and due consideration,

It is adjudged and ordered that the said plea in abatement be, and the same hereby is, held to be wholly insufficient in law and in equity to abate said matter presented by the Territory of New Mexico by its intervening petition, to all of which the said C. W. Smith, as such receiver, and the United States Trust Company of New York duly excepted, and thereupon they were each, against the objection and exception of said intervening petitioner, given leave to file a demurrer to said intervening petition. Thereupon they immediately filed a joint and several demurrer to said intervening petition of the Territory of New Mexico, which, by consent of counsel, was at once taken up and argued by counsel and considered

228 by the court, and upon argument by counsel and the court being duly advised in the premises, it is by the court

Ordered, considered and decreed that said demurrer be, and the same hereby is, sustained to each and every portion of the intervening petition which claims any taxes levied upon the assessment of the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, and structures together with the telegraph line erected upon the right of way of the Atlantic & Pacific Railroad Company in the county of Valencia, and constituting improvements upon the land embraced within said right of way where the same runs over what was public domain of the United States when said right of way was granted to the Atlantic & Pacific Railroad Company, alleged in said intervening petition to be 33 miles in length, and assessed for 1892 at the sum of $214,500, and for the year 1893, at $214,500, and for the year 1894, at $214,500, and for the year 1895, at $214,500, and for the year 1896, at $214,500; also, to each and every portion of said intervening petition which claims any taxes to be due upon an assessment of any of the various station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station, San Jose

station, El Rito station, Laguna station, Cubero station, McCarty's station, Grant's station and Bluewater station, which were assessed in the aggregate for the year 1892 for $11,340, in 1893, for $11,340, for the year 1894 for $17,349, for the year 1895 for $17,349, and for the year 1896 for $17,349, and it was further considered by the court that decision would be reserved as to each demurrer concern-
229 ing that portion of the intervening petition claiming or alleging any interest to be due upon any of the taxes sought to be recovered for either of said years until the final hearing in said cause.

It is further ordered, considered and adjudged, by the court that the demurrer, and each and every ground thereof, to all those portions of the intervening petition seeking to recover taxes upon the assessment of cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line and other structures erected upon the right of way of the Atlantic & Pacific Railroad Company in said county of Valencia, and constituting improvements upon the land embraced within said right of way where it runs over lands which were held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, as alleged in said intervening petition, alleged to have been assessed for 1892 in the sum of $394,550, in 1893 in the sum of $394,550, in the year 1894 in the sum of $394,550, in the year 1895 in the sum of $394,550, and in the year 1896 in the sum of $394,550, be and the same hereby is overruled, to which ruling the said C. W. Smith, as such receiver, and the United States Trust Company of New York, duly excepted, and

It is further considered by the court that each demurrer to the entire amount claimed as taxes levied for each of the years mentioned, and each and every ground thereof, be severally overruled, and

It was further considered by the court that the general demurrer to the entire intervening petition of the Territory of New Mexico, and as to each and every ground thereof, be and the same hereby is, overruled, whereupon the said C. W. Smith, late receiver, and
230 the United States Trust Company of New York, jointly and severally obtained leave, against the objections and exception of the intervening petitioner, to file pleas to all that portion of the intervening petition as to and concerning which the demurrer was overruled, and it was agreed between counsel for the respective parties, and the court, that in preparing and filing said pleas the said parties might in any one plea embrace a statement of any and all facts which were common to each claim for taxes contained in said intervening petition for each year, or any year, regardless of whether or not such facts, or any of them, ought under strict rules of pleading be required to be embraced in separate pleas, and thereupon, the further hearing in said cause was continued until the coming in of said pleas.

J. W. CRUMPACKER, *Judge.*

September 27, 1899.

That on, to wit, the 27th day of September, 1899, there was filed in the office of the clerk of said court the demurrer referred to in

the order last above recited, which said demurrer is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Complainant, *vs.* THE ATLANTIC & PACIFIC RAILROAD COMPANY *et al.*, Defendants. } In Equity. No. 1122.

In the matter of the intervention of the Territory of New Mexico in the above-entitled action.

231 The joint and several demurrer of C. W. Smith, as receiver, and the United States Trust Company of New York, to the petition in intervention filed in this cause by the Territory of New Mexico to collect certain taxes alleged to have been assessed in Valencia county, New Mexico.

By protestation, not confessing or acknowledging all or any of the matters and things in and by said intervening petition set forth and complained of to be true, in such manner and form as the same are therein and thereby set forth and alleged, C. W. Smith, as receiver, and the United States Trust Company of New York are advised by their counsel that there is no matter or thing in certain portions of said intervening petition contained, good and sufficient in law to call the said C. W. Smith, as receiver, or the United States Trust Company of New York in question in this honorable court for the same, but that there is good cause of demurrer thereunto, and therefore C. W. Smith, as such receiver, and the United States Trust Company of New York jointly and severally doth demur to so much and such part of the said intervening petition as seeks to recover from the funds in the possession of the said C. W. Smith, as receiver, or to establish a claim against him as such receiver, or a lien upon the property in his hands as such receiver, for the taxes alleged in said intervening petition to have been assessed in 1896 by Solomon Luna as collector of Valencia county, New Mexico, as an additional assessment by him, as such collector, upon the
232 assessment-rolls of said county, for said year 1896, as and for an assessment of thirty-three miles of the right of way of the Atlantic & Pacific Railroad Company for the year 1892, claimed to have been omitted from the assessment-rolls for that year, and assessed, as stated in said intervening petition, by the said Solomon Luna, as collector, at $214,500.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity, in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896 for the year 1892.

2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose

by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1892, at the sum of $214,500.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $214,500.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person, upon such assessment.

4th. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That the portion of said intervening petition referred
233 to discloses, upon its face, that the property so assessed by said collector in the sum of $214,500.00 was and is exempt from taxation under and by virtue of the second section of the act of Congress approved July 27, 1866.

6th. That said intervening petition shows upon its face that the property pretended to have been assessed was real estate, and that no sufficient description of such real estate was made upon which any valid assessment could be based, or taxes levied.

7th. That the description given in the assessment referred to of the property assessed was, and is, wholly insufficient to identify such property so that the identical 33 miles referred to in such assessment can be distinguished from the entire 93.7 miles of right of way in Valencia county, New Mexico, shown to exist by said intervening petition.

And C. W. Smith, as such receiver, and the United States Trust Company of New York doth further jointly and severally demur to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim for the same against him, as such receiver, or the property in his custody as such receiver, as and for an assessment made by the collector of said county in 1896, on that certain property of the Atlantic & Pacific Railroad Company, for the year 1892, and alleged to have been assessed at $11,340.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity, in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1892.

2d. That the said portion of said intervening petition re-
234 ferred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1892, at the sum of $11,340.00, as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $11,340.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person, upon such assessment.

4th. That the said portion of said intervening petition referred to

wholly fails to set forth and disclose any notice given by such collector of such additional assessment as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That the portion of said intervening petition referred to discloses, upon its face that the property so assessed by said collector in the sum of $11,340.00 was and is exempt from taxation under and by virtue of the second section of the act of Congress approved July 27, 1866.

6th. That said intervening petition shows upon its face that the property pretended to have been assessed was real estate, and that no sufficient description of such real estate was made upon which any valid assessment could be based, or taxes levied.

7th. That the description given in the assessment referred to of the property assessed was, and is, wholly insufficient to identify such property so that the identical property referred to in such assessment can be distinguished from any other portion of the
235 entire 93.7 miles of right of way in Valencia county, New Mexico, shown to exist by said intervening petition.

And C. W. Smith, as such receiver, and the United States Trust Company doth further jointly and severally demur as to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him as such receiver, or the property in his custody as such receiver for the same upon an assessment made by the collector of said county in the year 1896, for the year 1892, as and for an additional assessment of such property for the year 1892, and which is alleged to have been assessed at the sum of $394,550.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity, in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1892.

2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1892, at the sum of $394,550.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $394,550.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person upon such assessment.

4th. That the said portion of said intervening petition re-
236 ferred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That upon the face of the facts stated in said portion of said intervening petition, the property assessed at the said sum of $394,550.00 was assessed as personal property, and not as real estate, although the same appears to have been, and is shown by said in-

tervening petition to have been real estate, capable of being described as such sufficiently in accordance with the requirements of the statutes of New Mexico for the assessment of real estate.

6th. That it is impossible to ascertain from the facts stated in the intervening petition concerning the assessment made in 1896 for the year 1892, as to what exact mileage of right of way of the Atlantic & Pacific Railroad Company is claimed in said intervening petition to have been acquired by the Atlantic & Pacific Railroad Company *from any* person, persons or corporations, other than the Government of the United States, or from any lands other than public lands.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York doth further jointly and severally demur as to so much and such parts of said intervening petition as seek to recover from the funds in the hands of the receiver, or to establish a claim against him as such receiver, or the property in his custody as such receiver, for certain interest or penalties alleged to be due and for cause of demurrer saith:

1st. That said portion of said intervening petition referred
237 to is without equity in respect to the claim of the Territory to collect any interest or penalties alleged to be due upon the taxes levied upon the assessment made in 1896, for the year 1892.

2d. That said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company or to its receivers, or any other person or persons.

And further saith that they, and each of them, are advised by their counsel that there is no matter or thing in said intervening petition contained, concerning the additional assessment for the year 1892, as therein alleged, good and sufficient in law to call them, or either of them, in question in this honorable court, for the same. but that there is good cause of demurrer thereunto, and therefore they, and each of them jointly and severally, and each for him and itself, doth demur thereunto, and for cause of demurrer saith:

1st. That said intervening petition referred to is without equity in -espect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1892.

2d. That the said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1892, at the aggregate sum of $620,390.00.

3d. That said intervening petition referred to does not disclose that the property alleged to have been listed at the valuation of
$620,390.00 had any of the taxes sought to be recovered as-
238 sessed against it by the collector or any other person upon such assessment.

4th. That the said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment as above referred to, to the Atlantic & Pacific

Railroad Company, or to its receivers, or any other person or persons.

5th. That the total amount demanded by said intervening petition as taxes levied upon the assessment, as and for the year 1892, to wit, the sum of $13,586.54 is an aggregate levy upon the aggregate assessment of all the property assessed for said year by said collector, aggregating $620,390.00, which said aggregate assessment was, upon the face of the facts stated in the said intervening petition, made upon property exempt from assessment and taxation, as well as upon property not exempt.

And C. W. Smith, as receiver, and the United States Trust Company of New York, jointly and severally doth further demur to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim for the same against him, or the property in his custody, as such receiver, for an assessment made by the collector of said county in 1896, on certain property of the Atlantic & Pacific Railroad Company, for the year 1893, and alleged to have been assessed at $214,500.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1893.

239 2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1893, at the sum of $214,500.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $214,500.00 had any taxes assessed against it by the collector, or any other person upon such assessment.

4th. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company or to its receivers, or any other person or persons.

5th. That the portion of said intervening petition referred to discloses upon its face that the property so assessed by said collector in the sum of $214,500.00 was and is exempt from taxation under and by virtue of the second section of the act of Congress approved July 27, 1866.

6th. That said intervening petition shows upon its face that the property pretended to have been assessed was real estate, and that no sufficient description of such real estate was made upon which any valid assessment could be based, or taxes levied.

7th. That the description given in the assessment referred to of the property assessed was, and is, wholly insufficient to identify such property so that the identical 33 miles referred to in such assess-

ment can be distinguished from the entire 93.7 miles of right
240 of way in Valencia county, New Mexico, shown to exist by said intervening petition.

And the said C. W. Smith, as receiver, and the United States Trust Company of New York, jointly and severally, doth further demur to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him, as such receiver, or the property in his custody as such receiver, as and for an assessment made by the collector of said county in 1896, on certain property of the Atlantic & Pacific Railroad Company, for the year 1893, and alleged to have been assessed at $11,340.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1892.

2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1893, at the sum of $11,340.00, as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $11,340.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person upon such assessment.

4th. That the said portion of the said intervening petition referred to wholly fails to set forth and disclose any notice given by
241 such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That the portion of said intervening petition referred to discloses upon its face that the property so assessed by said collector in the sum of $11,340.00 was and is exempt from taxation under and by virtue of the second section of the act of Congress approved July 27, 1866.

6th. That said intervening petition shows upon its face that the property pretended to have been assessed was real estate, and that no sufficient description of such real estate was made upon which any valid assessment could be based, or taxes levied.

7th. That the description given in the assessment referred to of the property assessed was, and is wholly insufficient to identify such property so that the identical property referred to in such assessment can be distinguished from any other portion of the entire 93.7 miles of right of way in Valencia county, New Mexico, shown to exist by said intervening petition.

And C. W. Smith, as such receiver, and the United States Trust Company of New York, jointly and severally doth demur further as to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him as such receiver or the property in his custody as such receiver for the same upon an assessment made by the collector

of said county in the year 1896, for the year 1893, as and for an additional assessment of such property for the year 1893, and
242 which was alleged to have been assessed at the sum of $394,550.00 and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity, in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1893.

2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1893, at the sum of $394,550.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $394,550.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person or persons upon such assessment.

4th. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That upon the face of the facts stated in said portion of said intervening petition, the property assessed at the said sum of $394,550.00 was assessed as personal property, and not as real estate, although the same appears to have been, and is shown by said intervening petition to have been real estate, capable of being described as such sufficiently in accordance with the requirements of the statutes of New Mexico for the assessment of real estate.

243 6th. That it is impossible to ascertain from the facts stated in the intervening petition concerning the assessment made in 1896 for the year 1893, as to what exact mileage of right of way of the Atlantic & Pacific Railroad Company is claimed in said intervening petition to have been acquired by the Atlantic & Pacific Railroad Company from any person, persons or corporations, other than the Government of the United States, or from any lands other than public lands.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York doth further jointly and severally demur as to so much and such parts of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him, or the property in his custody as such receiver, for certain interest or penalties alleged to be due and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect interest or penalties upon the taxes levied upon the assessment made in 1896, for the year 1893.

2. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the

Atlantic & Pacific Railroad Company or its receivers, or any other person or persons.

And further saith that they, and each of them, are advised by their counsel that there is no matter or thing in said intervening petition contained, concerning the additional assessment for
244 the year 1893, as therein alleged, good and sufficient in law to call them, or either of them, in question in this honorable court, for the same, but that there is good cause of demurrer thereunto, and therefore they, and each of them jointly and severally, and each for him and itself, doth demur thereunto, and for cause of demurrer saith:

1st. That said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1893.

2d. That the said intervening petition referred to is indefinite, uncertain, and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1893, at the aggregate sum of $620,390.00.

3d. That said intervening petition referred to does not disclose that the property alleged to have been listed at the valuation of $620,390.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person upon such assessment.

4th. That said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That the total amount demanded by said intervening petition as taxes levied upon the assessment as and for the year 1893, to wit, the sum of $23,064.63 is an aggregate levy upon the aggre-
245 gate assessment of all the property assessed for said year by said collector, aggregating $620,390.00, which said aggregate assessment was, upon the face of the facts stated in the said intervening petition, made upon property exempt from assessment and taxation, as well as upon property not exempt.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York, jointly and severally doth further demur to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him, as such receiver, or the property under his control, for an assessment made by the collector of said county in 1896, on certain property of the Atlantic & Pacific Railroad Company, for the year 1894, and alleged to have been assessed at $214,500.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1894.

2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have

been assessed by said collector in the year 1896, for the year 1894, at the sum of $214,500.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $214,500.00 had any taxes assessed against it by the collector, or any other person upon such assessment.

246 4th. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company or to its receivers, or any other person or persons.

5th. That the portion of said intervening petition referred to discloses upon its face that the property so assessed by said collector in the sum of $214,500.00 was and is exempt from taxation under and by virtue of the second section of the act of Congress approved July 27, 1866.

6th. That said intervening petition shows upon its face that the property pretended to have been assessed was real estate, and that no sufficient description of such real estate was made upon which any valid assessment could be based, or taxes levied.

7th. That the description given in the assessment referred to of the property assessed was, and is wholly insufficient to identify such property so that the identical 33 miles referred to in such assessment can be distinguished from the entire 93.7 miles of right of way in Valencia county, New Mexico, shown to exist by said intervening petition.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York, jointly and severally, doth further demur to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim for the same against him, as such receiver, or the property in his custody as such receiver, as and for an assessment made by the collector of said county in 1896, on certain property of the Atlantic & Pacific Railroad Company, for the year 1894,

247 and alleged to have been assessed at $17,349.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1894.

2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1894, at the sum of $17,349.00, as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $17,349.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person upon such assessment.

4th. That the said portion of said intervening petition referred

to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That the portion of said intervening petition referred to discloses upon its face that the property so assessed by said collector in the sum of $17,349.00 was and is exempt from taxation under and by virtue of the second section of the act of Congress approved July 27, 1866.

6th. That said intervening petition shows upon its face that the property pretended to have been assessed was real estate, and
248 that no sufficient description of such real estate was made upon which any valid assessment could be based, or taxes levied.

7th. That the description given in the assessment referred to of the property assessed was, and is, wholly insufficient to identify such property so that the identical property referred to in such assessment can be distinguished from any other portion of the entire 93.7 miles of right of way in Valencia county, New Mexico, shown to exist by said intervening petition.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York, doth further demur as to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him, as such receiver, or the property in his custody as such receiver, for the same, upon an assessment made by the collector of said county in the year 1896, for the year 1894 as and for an additional assessment of such property for the year 1894, and which was alleged to have been assessed at the sum of $394,550.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity, in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1894.

2d. That the said portion of the said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the
249 year 1894, at the sum of $394,550.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $394,550.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person, upon such assessment.

4th. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That upon the face of the facts stated in said portion of said intervening petition the property assessed at the said sum of $394,550.00 was assessed as personal property, and not as real estate,

although the same appears to have been and is shown by said intervening petition to have been real estate, capable of being described as such sufficiently, in accordance with the requirements of the statutes of New Mexico for the assessment of real estate.

6th. That it is impossible to ascertain from the facts stated in the intervening petition the assessment made in 1896 for the year 1894 as to what exact mileage of right of way of the Atlantic & Pacific Railroad Company is claimed in said intervening petition to have been acquired by the Atlantic & Pacific Railroad Company from any person, persons or corporations other than the Government of the United States or from any lands other than public lands.

250 And the said C. W. Smith, as such receiver, and the United States Trust Company of New York doth jointly and severally demur as to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him, as such receiver, or the property in his control, as such receiver, for certain interests and penalties alleged to be due and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect any interest or penalties upon the taxes levied upon the assessment made in 1896, for the year 1894.

2d. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company or to its receivers, or any other person or persons.

And further saith that they, and each of them, are advised by their counsel that there is no matter or thing in said intervening petition contained, concerning the additional assessment for the year 1894, as therein alleged, good and sufficient in law to call them, or either of them, in question in this honorable court, for the same, but that there is good cause of demurrer thereunto, and therefore they, and each of them jointly and severally, and each for him and itself, doth demur thereunto, and for cause of demurrer saith:

1st. That said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied

251 upon the assessment made in 1896, for the year 1894.

2d. That the said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1894, at the sum of $626,399.00.

3d. That said intervening petition in its entirety does not disclose that the property alleged to have been listed at the valuation of $626,399.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person upon such assessment.

4th. That the said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment as above referred to, to the Atlantic & Pacific

Railroad Company, or to its receivers, or any other person or persons.

5th. That the total amount demanded by said intervening petition as taxes levied upon the assessment, as and for the year 1894, to wit, the sum of $20,020.16 is an aggregate levy upon the aggregate assessment of all the property assessed for said year by said collector, aggregating $626,399.00, which said aggregate assessment was, upon the face of the facts stated in the said intervening petition, made upon property exempt from assessment and taxation, as well as upon property not exempt.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York, jointly and severally doth further demur to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to
252 establish a claim for the same against him, as such receiver, or the property in his custody as such receiver, for an assessment made by the collector of said county in 1896, on certain property of the Atlantic & Pacific Railroad Company, for the year 1895, and alleged to have been assessed at $214,500.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1895.

2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1895, at the sum of $214,500.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $214,500.00 had any taxes assessed against it by the collector, or any other person upon such assessment.

4th. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company or to its receivers, or any other person or persons.

5th. That the portion of said intervening petition referred to discloses upon its face that the property so assessed by said collector in the sum of $214,500.00 was and is exempt from taxation under and by virtue of the second section of the act of Congress
253 approved July 27, 1866.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York, jointly and severally, doth further demur to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim for the same against him as such receiver, or the property in his custody as such receiver, as and for an assessment made by the collector of said county in 1896, on certain property of the Atlantic & Pacific Railroad Company, for the year

1895, and alleged to have been assessed at $17,349.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896 for the year 1895.

2d. That said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1895, at the sum of $17,349.00, as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety, discloses that the property alleged to have been listed at the valuation of $17,349.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person, upon such assessment.

4th. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by the
254 collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That the portion of said intervening petition referred to discloses upon its face that the property so assessed by said collector in the sum of $17,349.00 was and is exempt from taxation under and by virtue of the second section of the act of Congress approved July 27, 1866.

6th. That said intervening petition shows upon its face that the property pretended to have been assessed was real estate, and that no sufficient description of such real estate was made upon which any valid assessment could be based, or taxes levied.

7th. That the description given in the assessment referred to of the property assessed was, and is wholly insufficient to identify such property so that the identical property referred to in such assessment can be distinguished from any other portion of the entire 93.7 miles of right of way in Valencia county, New Mexico, shown to exist by said intervening petition.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York, jointly and severally doth further demur as to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him as such receiver, or the property in his custody as such receiver, for the same, upon an assessment made by the collector of said county in the year 1896, for the year 1895, as and for an additional assessment of such property for the
255 year 1895, and which was alleged to have been assessed at the sum of $394,550.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity, in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1895.

2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have

been assessed by said collector in the year 1896, for the year 1895, at the sum of $394,550.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $394,550.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person, upon such assessment.

4th. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That upon the face of the facts stated in said portion of said intervening petition the property assessed at the said sum of $394,550.00 was assessed as personal property, and not as real estate, although the same appears to have been and is shown by said intervening petition to have been real estate, capable of being de-
256 scribed as such sufficiently, in accordance with the requirements of the statutes of New Mexico for the assessment of real estate.

6th. That it is impossible to ascertain from the facts stated in the intervening petition concerning the assessment made in 1896 for the year 1895 as to what exact mileage of right of way of the Atlantic & Pacific Railroad Company is claimed in said intervening petition to have been acquired by the Atlantic & Pacific Railroad Company from any person, persons or corporations other than the Government of the United States or from any lands other than public lands.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York, doth further jointly and severally demur as to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him, or the property in his custody as such receiver for certain interest and penalties alleged to be due, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect any interest and penalties upon the taxes levied upon the assessment made in 1896 for the year 1895.

2d. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

257 And further saith that they and each of them are advised by their counsel that there is no matter or thing in said intervening petition contained, concerning the additional assessment for the year 1895, as therein alleged, good and sufficient in law to call them, or either of them, in question in this honorable court for the same, but that there is good cause of demurrer thereunto, and therefore they and each of them, jointly and severally, and each for him, and itself doth demur thereunto, and for cause of demurrer saith:

1st. That said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1895.

2d. That the said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by such collector in the year 1896, for the year 1895, at the sum of $626,399.00.

3d. That said intervening petition referred to does not disclose that the property alleged to have been listed at the valuation of $626,399.00, had any of the taxes sought to be recovered assessed against it by the collector, or any other person upon such assessment.

4th. That the said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That the total amount demanded by said intervening
258 petition as taxes levied upon the assessment, as and for the year 1895, to wit, the sum of $24,272.96 is an aggregate assessment of all the property assessed for said year by said collector, aggregating $626,399.00 which said aggregate assessment was, upon the face of the facts stated in the said intervening petition made upon property exempt from assessment and taxation, as well as upon property not exempt.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York, jointly and severally doth further demur to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him as such receiver, or the property in his custody as such receiver, for an assessment made by the collector of said county in 1896, on certain property of the Atlantic & Pacific Railroad Company, for the year 1896, and alleged to have been assessed at $214,500.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1896.

2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1896, at the sum of $214,500.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of
259 $214,500.00 had any taxes assessed against it by the collector, or any other person upon such assessment.

4th. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the At-

lantic & Pacific Railroad Company or to its receivers, or any other person or persons.

5th. That the portion of said intervening petition referred to discloses upon its face that the property so assessed by said collector in the sum of $214,500.00 was and is exempt from taxation under and by virtue of the second section of the act of Congress approved July 27th, 1866.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York, jointly and severally, doth further demur to so much and such parts of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim for the same against him, as such receiver, or the property in his custody as such receiver, as and for an assessment made by the collector of said county in 1896, on certain property of the Atlantic & Pacific Railroad Company, for the year 1896, and alleged to have been assessed at $17,349.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1896.

2d. That said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not dis-
260 close by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1896, at the sum of $17,349.00, as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $17,349.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person upon such assessment.

4th. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That the portion of said intervening petition referred to discloses upon its face that the property so assessed by said collector in the sum of $17,349.00 was and is exempt from taxation under and by virtue of the second section of the act of Congress approved July 27, 1866.

6th. That the said intervening petition shows upon its face that the property pretended to have been assessed was real estate, and that no sufficient description of such real estate was made upon which any valid assessment could be based, or taxes levied.

7th. That the description given in the assessment referred to of the property assessed was, and is wholly insufficient to identify such property so that the identical property referred to in such assess-
ment can be distinguished from any other portion of the en-
261 tire 93.7 miles of right of way in Valencia county, New Mexico, shown to exist by said intervening petition.

And the said C. W. Smith, as such receiver, and the United

States Trust Company of New York, jointly and severally doth further demur as to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him, as such receiver, or the property in his custody as such receiver, for the same, upon an assessment made by the collector of said county in the year 1896, for the year 1896, as and for an additional assessment of such property for the year 1896, and which was alleged to have been assessed at the sum of $394,550.00, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity, in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1896.

2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1896, at the sum of $394,550.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety discloses that the property alleged to have been listed at the valuation of $394,550.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person upon such assessment.

262 4th. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That upon the face of the facts stated in said portion of said intervening petition the property assessed at the said sum of $394,550.00 was assessed as personal property, and not as real estate, although the same appears to have been and is shown by said intervening petition to have been real estate, capable of being described as such sufficiently, in accordance with the requirements of the statutes of New Mexico for the assessment of real estate.

6th. That it is impossible to ascertain from the facts stated in the intervening petition concerning the assessment made in 1896 for the year 1896 as to what exact mileage of right of way of the Atlantic & Pacific Railroad Company is claimed in said intervening petition to have been acquired by the Atlantic & Pacific Railroad Company from any person, persons or corporations other than the Government of the United States or from any lands other than public lands.

And the said C. W. Smith, as such receiver, and the United States Trust Company of New York, jointly and severally doth further demur as to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him, as such receiver, or the property in his custody as such receiver for certain interest or penalties

263 alleged to be due, and for cause of demurrer saith:

1st. That said portion of said intervening petition referred to is without equity in respect to the claim of the Territory to collect any

interest or penalties upon the taxes levied upon the assessment made in 1896 for the year 1896.

2d. That said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

And further saith that they and each of them are advised by their counsel that there is no matter or thing in said intervening petition contained, concerning the additional assessment for the year 1896, as therein alleged, good and sufficient in law to call them, or either of them, in question in this honorable court for the same, but that there is good cause of demurrer thereunto, and therefore they and each of them, jointly and severally, and each for him, and itself doth demur thereunto, and for cause of demurrer saith:

1st. That said intervening petition referred to is without equity in respect to the claim of the Territory to collect taxes levied upon the assessment made in 1896, for the year 1896.

2d. That the said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1896, at the sum of $626,399.00.

264 3d. That said intervening petition referred to does not disclose that the property alleged to have been listed at the valuation of $626,399.00, had any of the taxes sought to be recovered assessed against it by the collector, or any other person upon such assessment.

4th. That the said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment as above referred to, to the Atlantic & Pacific Railroad Company, or to its receivers, or any other person or persons.

5th. That the total amount demanded by said intervening petition as taxes levied upon the assessment, as and for the year 1896, to wit, the sum of $24,272.96 is an aggregate levy upon the aggregate assessment of all the property assessed for said year by said collector, aggregating $626,399.00, which said aggregate assessment was, upon the face of the facts stated in the intervening petition, made upon property exempt from assessment and taxation, as well as upon property not exempt.

Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants do jointly and severally demur thereto, and each severally prays the judgment of this honorable court whether the said C. W. Smith, as such receiver, and the United States Trust Company of New York, or either of them, shall be compelled to make any answer to the said bill, and each humbly prays to be hence dismissed with his and its reasonable costs in this behalf sustained.

C. N. STERRY,

Solicitor and of Counsel for C. W. Smith, as Receiver, and the United States Trust Company of New York.

265 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

C. N. STERRY,
Solicitor and of Counsel for C. W. Smith, as Receiver, and the United States Trust Company of New York.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

C. N. Sterry, being duly sworn, deposes and says: That he is the sole solicitor and counsel for the said C. W. Smith, as receiver, and the said United States Trust Company of New York in the proceedings in which the above and foregoing demurrer is filed. That the said C. W. Smith, receiver, resides at Pasadena, Los Angeles county, State of California, and that the said United States Trust Company of New York has its residence and principal place of business in the city of New York, State of New York, and that neither one of said parties herein named to affiant's knowledge is within the territorial limits of the Territory of New Mexico at the time when this affidavit is made, or this demurrer is filed. Affiant further says that the foregoing demurrer is not interposed for delay.

C. N. STERRY.

Subscribed and sworn to before me this 27th day of September, A. D. 1899.

[SEAL.] HARRY P. OWEN,
Clerk District Court, Second Judicial District, New Mexico.

That afterwards, to wit, on the 30th day of September, 1899, there was filed in the office of the clerk of said court, the joint and
266 several plea in bar of said defendants, which said plea is in words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Plaintiff,
vs.
ATLANTIC & PACIFIC RAILROAD COMPANY ET AL., Defendants.

In the matter of the intervening petition of the Territory of New Mexico filed in this cause.

The joint and several pleas of the United States Trust Company of New York and C. W. Smith, late receiver of the Atlantic and Pacific Railroad Company, appointed by this court in the above-entitled cause, to the intervening petition of the Territory of New Mexico for the collection of taxes alleged to be due in Valencia county.

Plea.

The United States Trust Company, of New York, complainant herein, and C. W. Smith, late receiver of the property of the Atlantic and Pacific Railroad Company, by protestation, not confessing or acknowledging all or any part of the matters and things in the intervening petition of the Territory of New Mexico to be true, in such manner and form as the same are therein set forth and alleged, do plead thereto in relation to the amount of taxes alleged to have been levied by the collector of said county upon an assessment made by him after the tax-rolls of said county for
267 the year 1896 were placed in his hands for collection for a series of years commencing with the year, A. D. 1892, and ending with the year 1896, against the Atlantic and Pacific Railroad Company, and particularly in relation to the amount of taxes alleged to have been levied upon the assessment so made by him after such tax-rolls for 1896 were placed in his hands for the year 1892, against said company and its property in the sum of $13,586.54, the following facts in bar thereof, and in bar of the right of the Territory of New Mexico to receive or collect any amount of the taxes mentioned or described in said intervening petition for any of the years mentioned therein, and particularly said sum of $13,586.54, or any part thereof, taxes so alleged to have been levied and assessed for the year 1892, as aforesaid.

That the Atlantic & Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27th, 1866, and that under and by virtue of that act, and prior to the year 1885, the Atlantic & Pacific Railroad Company constructed and built, and it and its successors have ever since maintained in the county of Valencia, Territory of New Mexico, 93.458 miles of main line of railroad track upon the right of way granted to it under said act of Congress, which said right of way was, and is, of the extent of two hundred (200) feet in width through said county.

That prior to 1892, the Atlantic & Pacific Railroad Company had constructed and permanently attached to its right of way and station grounds cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts,
and telegraph lines, sufficient to make a railroad track to
268 operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables, and water tanks; and it had also permanently constructed thereon bridges and culverts of iron, stone and wood, and it also built, established and maintained over, along and upon its said right of way, a grade for its tracks and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so embedded in said grade so that the same formed a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic & Pacific Railroad Company, consisting of both passenger and freight trains thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory were a part of said main track and side tracks; and that the buildings at the stations above described were such as were and are necessary for the operation of the said railroad, and were and are permanently attached to said station grounds and right of way.

That in the year 1892 the Atlantic & Pacific Railroad Company had in said county and Territory, in addition to the property hereinabove described, a large amount of land which it then claimed belonged to it as a part of the lands granted to it by said act of Congress, and it also had some personal property subject to taxation therein.

That in the year 1892, the officers having charge of such
269 matters for the Atlantic & Pacific Railroad Company, made a return to the county assessor of said county of the property of said railroad company situated in said county of Valencia, and the return so made of the property is shown by Exhibit No. 1, which is a true copy, and which by reference thereto is made a part hereof.

That on and after the first day of March, 1892, and within the time required by law, one A. M. Bergere, the then duly qualified and acting assessor of Valencia county, Territory of New Mexico, for the year A. D. 1892, entered upon the assessment-roll for said county and Territory for said year, the assessment of all the property of the Atlantic & Pacific Railroad Company in Valencia county, in said Territory, which he claimed was subject to taxation, and for the purpose of making such assessment in conformity with the requirements of law, made and entered upon the assessment-rolls for said year, in said county, certain entries relative to the Atlantic & Pacific Railroad Company, and its property, both real and personal; a true, perfect, correct and complete copy of said assessment-roll, in so far as it shows the entries for the year 1892 concerning the Atlantic & Pacific Railroad Company, or its property, by said assessor,

is filed herewith, marked Exhibit No. 2, and the same by reference thereto is made a part of this plea.

That thereupon the said county assessor, upon a leaf in the assessment-roll opposite to the leaf in said roll containing the assessment of the Atlantic and Pacific Railroad Company and its property, as shown by Exhibit No. 2, entered and extended the various levies of taxes for said county for said year 1892, against said property and each item thereof; a full, true and complete copy of the
270 taxes levied against the Atlantic and Pacific Railroad Company and its property, and each item thereof, in said county, by said assessor, for said year A. D. 1892, as extended by him upon the page of said assessment-roll opposite the page containing the assessment itself, is shown by the paper herewith filed, marked Exhibit 3, which by reference thereto is made a part hereof.

That on the 5th day of September, 1892, the board of county commissioners of Valencia county, Territory of New Mexico, endorsed on the back of the assessment and tax roll so made by said assessor, as aforesaid their approval and warrant to the collector, a true and correct copy of which is shown on the back of the paper marked Exhibit 3, and to which reference is hereby made.

That on the 5th day of September, A. D. 1892, the said assessor duly verified his assessment and tax roll, a true copy of which verification is shown endorsed on the back of the paper marked Exhibit 3, and made a part hereof by reference thereto.

That on the 5th day of September, A. D. 1892, one Tranquilino Luna, now deceased, and who was then sheriff and *ex officio* collector of taxes for said county, endorsed upon the copy of the assessment-roll and tax-roll on that day delivered to him by the assessor a receipt, a copy of which is shown by the endorsement on the back of the paper marked Exhibit 3, and made a part hereof by reference thereto.

That the assessor in the year 1892, in accordance with law, made three assessment-rolls which contained the assessment of the property both real and personal, of Valencia county, in said Territory for that year with the taxes levied and extended thereon
271 against each item of property assessed, in the manner shown by Exhibits 2 and 3, and one of said assessment-rolls was delivered to the territorial auditor; one of said assessment-rolls was retained in the office of said assessor, and the other of said assessment-rolls was delivered to the said Tranquilino Luna, sheriff and *ex officio* collector as aforesaid.

That Exhibits 2 and 3 filed herewith are copies of that portion of the assessment and tax roll delivered by the assessor of said county to the said late Tranquilino Luna as said sheriff and *ex officio* tax collector, in so far as it in anywise described any property belonging to the Atlantic & Pacific Railroad Company or against which any tax was extended or levied for the year A. D. 1892, and such exhibits show exactly everything that was done in that year in the way of assessing the property of the said railroad company and of levying and extending a tax against the same, as the same appears upon the original assessment-roll.

That prior to the first day of January, 1894, the Atlantic & Pacific Railroad Company paid each and every item of taxes assessed and levied against it, or its property, in said Valencia county, Territory of New Mexico, save and except only that levied against the assessed value of its right of way and that levied against the figures set opposite the names of the stations. That said railroad company refused to pay the taxes levied upon its right of way and stations, shown by Exhibits 2 and 3, for the sole and only reason that it claimed that its entire right of way and station grounds in said county were exempt from taxation.

272 That subsequently and on the 4th day of June, 1894, in an action of foreclosure pending in this court, wherein The Mercantile Trust Company was plaintiff, and The Atlantic & Pacific Railroad Company was defendant, and in which receivers, who were the predecessors in office of the said C. W. Smith, late receiver herein, had been duly appointed, one Solomon Luna, who was then and at that time the duly appointed, acting and qualified collector of said county of Valencia, made and filed a petition in this court, in said cause, with permission of this court, and of which Exhibit 4 is a true and correct copy, and to which reference is hereby made.

That thereafterwards and on or about the 14th day of December, A. D. 1894, the said Solomon Luna filed in said cause his amended petition, a true and correct copy of which is attached hereto as Exhibit 5.

That thereupon the receivers named in said petition filed their certain pleas to said amended intervening petition in bar of the right to recover the taxes so assessed for such years, and that said pleas were set down for argument in said cause, but have not yet been heard or disposed of by the court, and that on the first day of February, A. D. 1896, C. W. Smith, herein, was duly appointed in this cause successor in office as receiver of the property of the Atlantic & Pacific Railroad Company, to the receivers named in said amended petition, and that he, the said C. W. Smith, since said time, and up to April 26, 1898, remained receiver in this cause under the order appointing him. That on April 26th, 1898, said C. W. Smith, was duly discharged as such receiver by an order

273 of the court made in this cause, and that no successor in office has ever been appointed by the court. That the action brought by the Mercantile Trust Company against the Atlantic & Pacific Railroad Company in which said intervening petition of said Solomon Luna as collector of the said county of Valencia was filed, has never been finally disposed of in this court, and no further action than that stated has ever been taken upon said intervening petition in said Mercantile Trust Company case, and the receivers appointed therein were and have been discharged since February 1, 1896.

That on the third day of May, 1897, all of the real and personal property of the Atlantic and Pacific Railroad Company of every kind, nature and description, situated or located in the county of Valencia and Territory of New Mexico, was sold under the decree of foreclosure entered in this cause, and in accordance with the

terms thereof, to Aldace F. Walker, Victor Morawetz and R. Somers Hayes. That on the fourth day of May, 1897, said sale was reported by the special master appointed to make the same to this court and by this court duly confirmed, and the said special master by such decree of confirmation was ordered to deed the property to the purchasers or their assigns; that on the 2nd day of June, 1897, the special master appointed by the decrees of this court to make the sale of said property, and ordered to make a conveyance of the same to the purchasers or their assigns, made, executed, and delivered to such purchasers a full and complete deed of conveyance of said property; that on the 7th day of June, 1897, and during all of the time prior thereto between the 1st day of March, 1897, and the said seventh day of June, 1897, and including said last-
274 named date, the duly elected, qualified and acting assessor of said county of Valencia had in his possession the assessment-rolls of said county for -aid year 1897, for the purpose of assessing all property in said county liable to assessment and taxation, and for the purpose of placing thereon property which had theretofore, during many years, been omitted from assessment and taxation. That on the 7th day of June, 1897, the same Solomon Luna, who had filed the intervening petition, and the amended intervening petition in the Mercantile Trust Company case as herein stated, still being sheriff and *ex officio* collector of said county, and having at said time in his custody and possession all of the tax lists or rolls of said county for the years, 1892, 1893, 1894, 1895 and 1896, entered upon a blank page of the tax-roll of 1896 an entry purporting to be the assessment of the improvements of the Atlantic & Pacific Railroad Company for the year 1892, a full, true and correct copy of the page in said tax-roll and the entries so made upon it by the said Solomon Luna at the said date, is hereto attached as Exhibit 6, and made a part hereof, and that at the same time, he the said Solomon Luna, attached to said blank page in said assessment-roll a sheet of legal-cap paper, typewritten, of which there is a true and correct copy attached to Exhibit 6; that these proceedings shown by Exhibit 6, is and constitutes the entire action of the said Solomon Luna as collector of said county in making and placing upon tax-rolls of said county for the year 1896, the assessment referred to in the intervening petition herein, and the levy of taxes thereon which is alleged in said intervening petition to be an assessment and levy of taxes upon the property of the At-
275 lantic & Pacific Railroad Company by the said collector in the year 1897 for the year 1892; that no oath or affidavit was made by the said Solomon Luna concerning such assessment upon said tax-roll; that no notice of the action of the said Solomon Luna, as such collector, in making said assessment and levying such taxes, as aforesaid was ever given by him, or by any one else for or on behalf of said county of Valencia to either the receiver herein, the United States Trust Company of New York, or the purchasers of said property at the time of the sale under said decree, or to the assigns of the said purchasers, the Santa Fe Pacific Railroad Company, except by the filing of the intervening petition herein; that

on the 22d day of June, 1897, the property so purchased at the sale under said decree, as stated, was sold and conveyed by the purchasers named to the Santa Fe Pacific Railroad Company, a corporation duly created under the act of Congress approved March 3, 1897; that on the 1st day of July, 1897, the then receiver in this action, C. W. Smith, delivered to the Santa Fe Pacific Railroad Company, as the assignee of the said purchasers the possession of all the property of every kind, nature and description sold under said decree, to the Santa Fe Pacific Railroad Company, which since said time has been, and now is, the owner and possessor thereof; that neither the purchasers of said property under said decree above named, nor the Santa Fe Pacific Railroad Company has ever been made a party to this action, or to these proceedings, nor have they, or either of them, ever appeared herein in person or by counsel; that the pretended assessment and levy of taxes as made by said Solomon Luna on June 7, 1897, was never presented
276 to, nor approved by the board of county commissioners of Valencia county; that no one ever appealed from said pretended assessment and levy of taxes last referred to, to the board of county commissioners of said county, or to the territorial board of equalization; that no property of any kind, character or description, situated in Valencia county, subject to taxation in the year 1892, was assessed in that year, or at any subsequent time, at to exceed twenty-five per cent. of its actual value; that in 1892, and since that time up to the present time there was another railroad running through said county, belonging to the New Mexico and Southern Pacific Railroad Company, a corporation incorporated under the laws of the Territory of New Mexico, and that said last-named railroad was during all of said years of a greater value per mile in said county than was and is the railroad formerly belonging to the Atlantic & Pacific Railroad Company, and now belonging to the Santa Fe Pacific Railroad Company, as stated, and that during each of the years from 1892 to 1896, inclusive, said last-named railroad company, including its right of way and superstructure thereon, rolling stock and franchise were never in any one of said years assessed at a greater sum than $6,625 per mile; that the assessment of the railroad in controversy, made in 1892 by the then assessor of said county, at a valuation of $327,103, was a fair, just and equitable assessment, based on the same proportion of the actual value as was the assessment of all other property for that year; that the pretended assessment by said collector in 1897, for the year 1892 at the sum of $620,390 was and is an excessive assessment, greatly in excess, as regards valuations of assessments of all
277 other property in said county, including the property of said other railroad company, and if added to the assessment made by the assessor in 1892, as stated, makes a grossly outrageous and inequitable assessment of said property. That the taxes levied in 1897, by said collector as and for the year 1892, as aforesaid, were never presented to the purchasers of said property at the sale under the decree as aforesaid, or to their assignee, by the said collector of said county or by any other person or persons for or on behalf of

said collector, or for said county, or said Territory, and that payment thereof was never demanded by said collector, or any other person or persons, for or to either the purchasers under said decree, or their assignee, the Santa Fe Pacific Railroad Company, at any time. That the taxes levied against the assessment of the right of way of said railroad in said county in the year 1892 as herein stated, and which remain unpaid upon the tax-rolls of said county for said year have never been presented to the said purchasers under said sale, or their assignee, the Santa Fe Pacific Railroad Company, and payment thereof has never been demanded from said purchasers or their assignee, the Santa Fe Pacific Railroad Company, nor have they at any time refused to pay the taxes assessed in the year 1892 against said property, or the taxes assessed upon the assessment made by said collector in the year 1897 as and for the year 1892, never having had an opportunity to either agree to pay or to refuse the payment of the same.

And the said United States Trust Company, and the said C. W. Smith, late receiver of the property of the Atlantic & Pacific Railroad Company further plead in relation to the amount of
278 taxes alleged to have been levied and assessed for the year 1893 against the Atlantic & Pacific Railroad Company in the sum of $23,064.63 the following additional facts in bar thereto and in bar to the right of the Territory of New Mexico to receive and collect said amount or any part thereof the following facts:

That on and after the first day of March, 1893, and prior to the first day of June, 1893, and within the time required by law, one Francisco Chavez y Armijo, the then duly qualified and acting assessor of Valencia county, Territory of New Mexico, for the year A. D. 1893, assessed and entered upon the assessment-roll for said county and Territory for said year an assessment of all the property of the Atlantic & Pacific Railroad Company in Valencia county, in said Territory for taxation, and for the purpose of making such assessment in conformity with the requirements of law, made and entered upon the assessment-roll for said year, in said county certain entries relative to the Atlantic & Pacific Railroad Company and its property, both real and personal, a true, perfect, correct and complete copy of said assessment-roll in so far as it shows any entries for the year 1893, of or concerning the Atlantic & Pacific Railroad Company, or its property, is filed herewith, marked Exhibit 7, and the same by reference thereto is made a part of this plea.

That thereupon the said county assessor, upon a leaf in the assessment-roll opposite to the leaf in said roll containing the assessment of the Atlantic & Pacific Railroad Company and its property, as shown by Exhibit 7, entered and extended various levies of taxes for said county for said year A. D., 1893, against the assess-
279 ment of said property and each item thereof; a full, true and complete copy of the assessment of the property of the Atlantic & Pacific Railroad Company in said county as made by said assessor, for the year 1893, and the taxes levied thereon as extended by him upon the page of said assessment-roll opposite the page containing

the assessment itself, is shown by the paper herewith filed, marked Exhibit 7, which by reference thereto, is made a part hereof.

That on the 6th day of July, A. D. 1893, the board of county commissioners of Valencia county, Territory of New Mexico, endorsed on the back of the assessment and tax roll so made by said assessor as aforesaid, their approval and warrant to the collector, a true and correct copy of which is shown on the back of the paper marked Exhibit 7, to which reference is hereby made.

That on the 18th day of September, A. D. 1893, the said assessor verified his assessment and tax roll, a true copy of which verification is shown endorsed on the back of the paper marked Exhibit 7, and made a part hereof by reference thereto.

That on the 18th day of September, 1893, the said Solomon Luna who was sheriff and *ex officio* collector of taxes for said county, endorsed upon the copy of the assessment-roll and tax-roll on that day delivered to him by the assessor, a receipt, a copy of which is shown by the endorsement on the back of the paper marked Exhibit 7, made a part hereof by reference thereto.

That the assessor in the year 1893, in accordance with law, made three assessment-rolls, which contained the assessment of the property, both real and personal, of Valencia county, in said Ter-
280 ritory, for that year, with the taxes levied and extended thereon against each item of property assessed belonging to said railroad company in the manner shown by Exhibit 7, and one of said assessment-rolls was delivered to the territorial auditor, and one of said assessment-rolls was retained in the office of said assessor, and the other of said assessment-rolls was delivered to the said Solomon Luna, sheriff and *ex officio* tax collector, as aforesaid; that Exhibit 7, filed herewith, is a copy of that portion of the assessment and tax roll delivered by the assessor of said county to the said Solomon Luna, as said sheriff and *ex officio* tax collector, and which in anywise described property belonging to the Atlantic & Pacific Railroad Company, or against which any tax was extended or levied for the year A. D. 1893, and such exhibits show exactly everything that was done in that year in the way of assessing the property of said railroad company, and of levying or extending a tax against the same, as the same appears upon the original assessment-roll in the hands of the said Solomon Luna.

That the assessment and tax rolls of said county and Territory for the said year retained by said assessor, and the one sent to the territorial auditor, are substantially duplicates of the one delivered to the said Solomon Luna.

That the only levy of taxes against any property of the Atlantic & Pacific Railroad Company for said year 1893 remaining unpaid, is that shown to have been extended and levied upon the assessment of the right of way of the Atlantic & Pacific Railroad Company which was assessed at the lump sum of $327,103, upon
281 the assessment-roll for said year, together with the further sums placed in said assessment-roll in the column "Value of personal property" opposite the words contained in the column in said assessment-roll headed "Name of property-owner."

That on the 7th day of June, 1897, the same Solomon Luna who had filed the intervening petition, and the amended intervening petition in the Mercantile Trust Company case, as herein stated, still being the sheriff and *ex officio* collector of said county, and having at said time in his custody and possession all of the tax lists or rolls of said county for the years, 1892, 1893, 1894, 1895 and 1896, entered upon a blank page of the tax-roll of 1896 an entry purporting to be the assessment of the improvements of the Atlantic & Pacific Railroad Company for the year 1893, a full, true and correct copy of the page in said tax-roll and the entries so made upon it by the said Solomon Luna at the said date is hereto attached as Exhibit 8, and made a part hereof, and that at the same time he the said Solomon Luna attached to said blank page in said assessment-roll a sheet of legal-cap paper typewritten, of which there is a true and correct copy attached to Exhibit 8; that these proceedings shown by Exhibit 8 is and constitutes the entire action of the said Solomon Luna as collector of said county in making and placing upon tax-roll of said county for the year 1896, the assessment referred to in the intervening petition herein, and the levy of taxes thereon which is alleged in said intervening petition to be an assessment and levy of taxes upon the property of the Atlantic and Pacific Railroad Company by the said collector in the year 1897, for the year 1893; that no oath or affidavit was made by the said Solomon Luna concerning such assess-
282 ment upon said tax-roll; that no notice of the action of the said Solomon Luna as such collector in making such assessment and levying such taxes as aforesaid, was ever given by him, or by any one else for or on behalf of said county of Valencia to either the receiver herein, the United States Trust Company of New York, or the purchasers of said property at the time of the sale under the said decree, or to the assigns of such purchasers, the Santa Fe Pacific Railroad Company; that the pretended assessment and levy of taxes as made by the said Solomon Luna on June 7th, 1897, was never presented to, nor approved by the board of county commissioners of Valencia county; that no one ever appealed from said pretended assessment and levy of taxes last referred to, to the board of county commissioners of said county or to the territorial board of equalization; that no property of any kind, character or description situated in Valencia county, subject to taxation in the year 1893, was assessed in that year, or at any subsequent time at to exceed twenty-five per cent. of its actual value; that the assessment of said railroad in controversy made in 1893, by the then assessor of said county at a valuation of $327,103 was a fair, just and equitable assessment, based on the same proportion of the actual value as was the assessment of all other property for that year; that the pretended assessment by the said collector in 1897, for the year 1893, at the sum of $620,390 was and is an excessive assessment, greatly in excess, as regards valuation, of assessments of all other property in said county, including the property of said other railroad company, and if added to the assessment made by the assessor in 1893, as stated, makes
283 a grossly outrageous and inequitable assessment of said property. That the taxes levied in 1897, by said collector as and

for the year 1893, as aforesaid, were never presented to the purchasers of said property at the sale under the decree as aforesaid, or to their assignee, by the said collector of said county, or by any other person or persons for or on behalf of said collector, or for the said county or said Territory and that payment thereof was never demanded by said collector or any other person or persons, of or to either the purchasers under said decree or their assignee, the Santa Fe Pacific Railroad Company, at any time prior to the filing of this plea. That the taxes levied against the assessment of the right of way in said county in the year 1893, as herein stated, and which remain upon the tax-rolls of said county for said year have never been presented to the said purchasers under said sale, or their assignee, the Santa Fe Pacific Railroad Company and payment thereof has never been demanded from said purchasers or their assignee, the Santa Fe Pacific Railroad Company, nor have they at any time refused to pay the taxes assessed in the year 1893 against said property, or the taxes assessed upon the assessment made by said collector in the year 1897 as and for the year 1893, never having had an opportunity to either agree to pay or to refuse the payment of the same.

And the said United States Trust Company of New York, and the said C. W. Smith, late receiver, further plead in relation to the amount of taxes alleged to have been levied and assessed for the year 1894, against the Atlantic & Pacific Railroad Company in the sum of $23,020.16 the following additional facts in bar thereto,
284 and in bar to the right of the Territory of New Mexico to receive and collect said amount, or any part thereof, from said receiver:

That in the year 1894, between the first day of March and the first day of June of that year the duly elected, qualified and acting assessor of Valencia county, Territory of New Mexico, made an assessment of all of the property of the Atlantic & Pacific Railroad Company situated in that county, upon the assessment-roll of said county for the purpose of taxation, a true and correct copy of said assessment-roll, so far as the property of the Atlantic & Pacific Railroad Company is concerned, as made by said assessor, is shown by Exhibit 9, hereto attached to which reference is hereby made.

That thereafterwards and in the year 1894, in conformity to the provisions of the laws of the Territory of New Mexico, there was levied against the assessment so made by the assessor by the proper authorities of Valencia county, in the Territory of New Mexico, taxes in the aggregate amounting to $26,144.46.

That of the taxes so levied, the predecessors in office of the said C. W. Smith, late receiver, paid all the taxes levied upon the personal property so assessed as shown hereinabove, and paid the taxes levied upon the assessment of the 169,167.48 acres of land assessed by the said assessor, but refused to pay the remainder of the taxes because of the fact that the assessment as made by said assessor and increased by said board of equalization, was an assessment of the right of way and station grounds of the Atlantic & Pacific Railroad Company, which were claimed to be exempt under the act of Con-

gress creating said railroad company, and because of the fact
285 that said assessment as made by the assessor and fixed by the board was unjust, illegal, excessive and oppressive.

That on the 7th day of June, 1897, the same Solomon Luna who had filed the intervening petition, and the amended intervening petition in the Mercantile Trust Company case, as herein stated, still being the sheriff and *ex officio* collector of said county, and having at said time in his custody and possession all of the tax lists or rolls of said county for the years 1892, 1893, 1894, 1895 and 1896, entered upon a blank page of the tax-roll of 1896 an entry purporting to be the assessment of the improvements of the Atlantic & Pacific Railroad Company for the year 1894, a full, true and correct copy of the page in said tax-roll, and the entries so made upon it by the said Solomon Luna, at the said date, is hereto attached as Exhibit 10, and made a part hereof, and that at the same time he, the said Solomon Luna attached to said blank page in said assessment-roll a sheet of legal-cap paper, typewritten, of which there is a true and correct copy attached to Exhibit 10; that these proceedings shown by Exhibit 10 *is* and constitute the entire action of the said Solomon Luna as collector of said county in making and placing upon tax-rolls of said county for the year 1896 the assessment referred to in the intervening petition herein and the levy of taxes thereon which is alleged in said intervening petition to be an assessment and levy of taxes upon the property of the Atlantic & Pacific Railroad Company by the said collector in the year 1897 for the year 1894; that no oath or affidavit was made by the said Solomon Luna concerning such assessment upon said tax-roll; that no notice of the action of the said Solomon Luna as such
286 collector in making said assessment and levying such taxes, as aforesaid, was ever given by him or by any one else for or on behalf of said county of Valencia to either the receiver herein, the United States Trust Company of New York, or the purchasers of the said property at the time of the sale under said decree, or to the assigns of the said purchasers, the Santa Fe Pacific Railroad Company; that the pretended assessment and levy of taxes as made by the said Solomon Luna on June 7th was never presented to, nor approved by the board of county commissioners of Valencia county; that no one ever appealed from said pretended assessment and levy of taxes last referred to, to the board of county commissioners of said county or to the territorial board of equalization; that no other property of any kind, character or description, situated in Valencia county, subject to taxation in the year 1894, was assessed in that year, or at any subsequent time, at to exceed twenty-five per cent. of its actual value; that the assessment of the railroad in controversy, made in 1894, by the then assessor of said county, and said board, at a valuation of $607,477 was an excessive, unjust, oppressive and inequitable assessment and not based on the same proportion of the actual value as was the assessment of all other property for that year, including property of the same character; that the pretended assessment by said collector in 1897, for the year 1894, at the sum of $626,399 was and is an excessive assessment,

greatly in excess as regards valuation of assessments of all other property in said county, including the property of said other railroad company, and if added to the assessment made by the assessor in 1894, as stated, makes a grossly out-
287 rageous and inequitable assessment of said property. That the taxes levied in 1897 by said collector as and for the year 1894, as aforesaid, were never presented to the purchasers of said property at the sale under the decree as aforesaid, or to their assignee by the said collector of said county, or by any other person or persons for or on behalf of said collector, or for the said county, or said Territory, and that payment thereof was never demanded by said collector, or any other person or persons for or to either the purchasers under said decree, or their assignee, the Santa Fe Pacific Railroad Company, at any time. That the taxes levied against the assessment of the right of way of said railroad in said county in the year 1894 as herein stated, and which remains unpaid upon the tax-rolls of said county for said year have never been presented to the said purchasers under said sale, or their assignee, the Santa Fe Pacific Railroad Company, and payment thereof has never been demanded from said purchasers or their assignee, the Santa Fe Pacific Railroad Company, nor have they at any time refused to pay the taxes assessed in the year 1894 against said property, or the taxes assessed upon the assessment made by said collector in the year 1897, as and for the year 1894, never having had an opportunity to either agree to pay or to refuse the payment of the same.

And the said United States Trust Company of New York, and the said C. W. Smith, late receiver, further plead in relation to the amount of taxes alleged to have been levied and assessed for the year 1895 against the Atlantic & Pacific Railroad Company in the sum of $23,020.16 the following facts in bar thereto and in
288 bar to the right of the Territory of New Mexico to receive and collect said amount, or any part thereof from said receiver:

That some time in the year 1895, and after the first day of March, A. D. 1895, the exact date of which these defendants are unable to state, the duly appointed, qualified and acting assessor of Valencia county, in the Territory of New Mexico, made and entered upon his books an assessment of the property of the Atlantic & Pacific Railroad Company. A true and correct copy of said assessment-roll, so far as it relates to the property of the said railroad company, is shown by Exhibit 11, hereto attached.

That thereafterwards in conformity to the provisions of the laws of the Territory of New Mexico, there was levied against the assessment so made by the assessor, by the proper authorities of Valencia county, in the Territory of New Mexico, taxes in the aggregate amounting to $25,381.84.

That of the taxes so levied the predecessors in office of the said C. W. Smith paid all the taxes levied by the assessor upon the assessment of personal property and the land of the company, but refused to pay the balance of the taxes because of the fact that the assessment as made by said assessor was an assessment of the right of

way and station grounds of the Atlantic & Pacific Railroad Company, which were exempt under the act of Congress creating said railroad company, and for the further reason that such assessment was excessive, oppressive and greatly in excess as to valuation over that of any other property in said county, including property of the same character at greater actual value. That on the 7th day of June,
1897, the same Solomon Luna who had filed the intervening pe-
289 tition, and the amended intervening petition in the Mercantile
Trust Company case, as herein stated, still being the sheriff and *ex officio* collector of said county, and having at the same time in his custody and possession all of the tax lists or rolls of said county for the years 1892, 1893, 1894, 1895, and 1896, entered upon a blank page of the tax-roll of 1896 an entry purporting to be the assessment of the improvements of the Atlantic & Pacific Railroad Company for the year 1895, a full, true, and correct copy of the page in said tax-roll and the entries so made upon it by the said Solomon Luna at the said date, is hereto attached as Exhibit 12, and made a part hereof, and that at the same time he, the said Solomon Luna, attached to said blank page in said assessment-roll a sheet of legal-cap paper, typewritten, of which there is a true and correct copy attached to Exhibit 12; that these proceedings shown by Exhibit 12 are and constitute the entire action of the said Solomon Luna as collector of said county in making and placing upon the tax-rolls of said county for the year 1896, the assessment referred to in the intervening petition herein, as being an assessment made by the collector on the tax-rolls of the year 1896 for the year 1895, and the levy of the taxes thereon which is alleged in said intervening petition to be a levy of taxes upon the property of the Atlantic & Pacific Railroad Company by the said collector on the rolls of the year 1896, for the year 1895; that no oath or affidavit was made by the said Solomon Luna concerning such assessment upon said tax-roll; that no notice of the action of Solomon Luna, as such collector, in
making said assessment and levying such taxes, as afore-
290 said, was ever given by him, or by any one else for or on be-
half of said county of Valencia to either the receiver herein, the United States Trust Company of New York, or the purchasers of said property at the time of the sale under said decree, or to the assigns of the said purchasers, the Santa Fe Pacific Railroad Company, except by the filing of the intervening petition herein. That the pretended assessment and levy of taxes as made by said Solomon Luna on June 7, 1897, was never presented to, nor approved by the board of county commissioners of Valencia county; that no one ever appealed from said pretended assessment and levy of taxes last referred to, to the board of county commissioners of said county, or to the territorial board of equalization; that no property of any kind, character or description, situated in Valencia county, subject to taxation for the year 1895, was assessed in that year, or at any subsequent time, at to exceed twenty-five per cent. of its actual value. That the assessment of the railroad in controversy, made in 1895 by the then assessor of said county, at a valuation of $609,050 was — excessive, unjust, oppressive and inequitable assessment, and not based

on the same proportion of the actual value as was the assessment of all other property for that year, including property of the same character; that the pretended assessment by said collector in 1897, for the year 1895, at the sum of $626,399 was and is an excessive assessment, greatly in excess as regards valuation of assessments of all other property in said county, including the property of said other railroad company, and if added to the assessment made by the assessor in 1895, as stated, makes a grossly outrageous and in-
291 equitable assessment of said property. That the taxes levied in 1897 by said collector as and for the year 1895, as aforesaid, were never presented to the purchasers of said property at the sale under the decree as aforesaid, or to their assignee by the said collector of said county, or by any other person or persons for or on behalf of said collector, or for the said county, or said Territory, and that payment thereof was never demanded by said collector, or any other person or persons for or to either the purchasers under said decree, or their assignee, the Santa Fe Pacific Railroad Company, at any time prior to the filing of this plea. That the taxes levied against the assessment of the right of way of said railroad in said county in the year 1895 as herein stated, and which remains unpaid upon the tax-rolls of said county for said year have never been presented to the said purchasers under said sale, or their assignee, the Santa Fe Pacific Railroad Company, and payment thereof has never been demanded from said purchasers or their assignee, the Santa Fe Pacific Railroad Company, nor have they at any time refused to pay the taxes assessed in the year 1895 against said property, or the taxes assessed upon the assessment made by said collector in the year 1897, as and for the year 1895, never having had an opportunity to either agree to pay, or to refuse the payment of the same.

And the said United States Trust Company of New York, and the said C. W. Smith, late receiver, do further plead in relation to the amount of taxes alleged to have been levied and assessed for the year 1896 against the Atlantic & Pacific Railroad Company in
292 the sum of $24,272.96 the following additional facts in bar thereto and in bar of the right of the Territory of New Mexico to receive and collect said amount or any part thereof from said receiver:

That between the first day of March and the first day of June, 1896, the duly appointed, qualified and acting assessor of Valencia county, New Mexico, entered upon his assessment-roll for said county and year an assessment of the property of the Atlantic & Pacific Railroad Company and extended the taxes to be levied on such assessment as required by law. That a full, true and correct copy of the said assessment and the taxes levied thereon as made by said assessor for said year, in so far as the property of the Atlantic & Pacific Railroad Company appearing thereon is concerned is hereto attached marked Exhibit 13, and made a part hereof. That the said assessor in due time returned to the board of county commissioners the assessment-roll including the assessment aforesaid, which was afterwards duly approved by the said board, as will appear by reference to Exhibit 13, and afterwards the said board duly endorsed

on said roll its levy of taxes for said year, which were extended on said tax-roll against said assessment, as will appear by reference to Exhibit 13, and caused the same to be delivered to the said Solomon Luna, as tax collector of said county. That thereafterwards, and in due time, the said C. W. Smith, as receiver, paid all the taxes so levied upon such assessment of the property of the Atlantic & Pacific Railroad Company, save and except only the taxes levied upon the assessment of the right of way and station grounds of said railroad company in said county, and this the said
293 C. W. Smith, as receiver, refused to pay on the ground of the claimed exemption of said right of way and station grounds, and on the further ground that the assessment was grossly and inequitably excessive and unjust, and at least seventy-five per cent. higher than the assessment of other like property in said county. That on the 7th day of June, 1897, the same Solomon Luna who had filed the intervening petition, and the amended intervening petition, in the Mercantile Trust Company case, as herein stated, still being the sheriff and *ex officio* collector of said county and having at said time in his custody and possession all of the tax lists or rolls of said county for the years 1892, 1893, 1894, 1895 and 1896, entered upon a blank page of the tax-roll of 1896 an entry purporting to be the assessment of the improvements of the Atlantic & Pacific Railroad Company for the year 1896, a full, true and correct copy of the page in said tax-roll, and the entries so made upon it by the said Solomon Luna at the said date, is hereto attached as Exhibit 14, and made a part hereof, and that at the same time he, the said Solomon Luna, attached to said blank page in said assessment-roll a sheet of legal-cap paper, typewritten, of which there is a true and correct copy attached to Exhibit 14; that these proceedings shown by Exhibit 14 *is* and constitutes the entire action of the said Solomon Luna as collector of said county in making and placing upon the tax-rolls of said county for the year 1896 the assessment referred to in the intervening petition herein and the levy of taxes thereon which is alleged in said intervening petition to be an assessment and levy of taxes upon the property of the Atlantic & Pacific Railroad Company by the said collector on the tax-rolls
294 for 1896 for the year 1896; that no oath or affidavit was ever made by the said Solomon Luna concerning such assessment upon said tax-roll; that no notice of the action of the said Solomon Luna as such collector in making said assessment and levying such taxes, as aforesaid, was ever given by him or by any one else for or on behalf of said county of Valencia to either the receiver herein, the United States Trust Company of New York, or the purchasers of the said property at the time of the sale under said decree, or to the assigns of the said purchasers, the Santa Fe Pacific Railroad Company; that the pretended assessment and levy of taxes as made by the said Solomon Luna on June 7th was never presented to, nor approved by the board of county commissioners of Valencia county; that no one ever appealed from said pretended assessment and levy of taxes last referred to, to the board of county commissioners of said county or to the territorial board of equalization; that no other

property of any kind, character or description, situated in Valencia county, subject to taxation in the year 1896, was assessed in that year, or at any subsequent time, at to exceed twenty-five per cent. of its actual value; that the assessment of the railroad in controversy, made in 1896 by the then assessor of said county, and said board, at a valuation of $609,050 was an excessive, unjust, oppressive and inequitable assessment and not based on the same proportion of the *actual value as was the* assessment of all other property for that year, including property of the same character; that the pretended assessment by said collector in 1897, for the year 1896, at the sum of $626,399, was and is an excessive assessment greatly in excess as regards
295 valuation of assessments of all other property in said county, including the property of said other railroad company, and if added to the assessment made by the assessor in 1896, as stated, makes a grossly outrageous and inequitable assessment of said property. That the taxes levied in 1897 by said collector as and for the year 1896, as aforesaid, were never presented to the purchasers of said property at the sale under the decree as aforesaid, or to their assignee by the said collector of said county, or by any other person or persons for or on behalf of said collector, or for the said county, or said Territory, and that payment thereof was never demanded by said collector, or any other person or persons for or to either the purchasers under said decree, or their assignee, the Santa Fe Pacific Railroad Company at any time prior to the filing of this plea. That the taxes levied against the assessment of the right of way of said county for the year 1896 as herein stated, and which remains unpaid upon the tax-rolls of said county for said year have never been presented to the said purchasers under said sale, or their assignee, the Santa Fe Pacific Railroad Company, and payment thereof has never been demanded from said purchasers or their assignee, the Santa Fe Pacific Railroad Company, nor have they at any time refused to pay the taxes assessed in the year 1896 against said property, or the taxes assessed upon the assessment made by said collector in the year 1897, as and for the year 1896, never having had an opportunity to either agree to pay or to refuse the payment of the same.

And the United States Trust Company of New York, and C. W. Smith, late receiver, jointly and severally say in addition to
296 the facts hereinbefore stated, and as applicable to each claim of taxes mentioned in the intervening petition: That the pretended assessment made by said Solomon Luna as collector, on the 7th day of June, 1897, for the years 1892, 1893, 1894, 1895 and 1896, was of a part and portion only of the right of way formerly belonging to the Atlantic & Pacific Railroad Company in said Valencia county, and not of the right of way itself, and covered precisely the same property that was assessed in each of the years above mentioned by the assessor for each year in the assessment made for each year of the said right of way, or of the main track of said railroad company, and constituted and constitutes an attempted assessment, not of property omitted for any of these years in the assessment-roll, but an additional assessment of a portion of the

property actually assessed and placed on the assessment-roll each year by the assessor for that year in said county. That by said action the said collector, Solomon Luna, on June 7, 1897, attempted for the purposes of taxation to segregate the improvements on the said right of way of said railroad company, in said county, which had during each of said years been assessed as aforesaid, and to assess the same as property omitted from the assessment-roll for each of said years. That no objection was ever made by the Atlantic & Pacific Railroad Company, or any or either of its receivers, to the description or form of assessment made by each assessor in each of said years on the assessment-roll of each of said years of the right of way or main track sought or attempted to be assessed, the only objection being urged to such assessment by either of the last-named parties was that such right of way was ex-
297 empt from taxation by the act of Congress creating the said railroad company, and that the assessment thereof for the years 1894, 1895 and 1896 were severally and each excessive, inequitable, unjust and oppressive, and greatly in excess of the valuation placed on all other property in said county for the purposes of assessment for taxation in each year above mentioned, including other similar railroad company, and was done for the purpose of discriminating against the particular property in controversy.

That the taxes levied on the property in controversy during all of the years referred to were duly and promptly paid, with the exception of those levied upon the assessment of the right of way of said railroad company in said county.

That during each of the years mentioned the New Mexico and Southern Pacific Railroad Company, incorporated under the laws of the Territory of New Mexico owned in said county 22.5 miles of main line and .74 miles of side track, with a telegraph line consisting of four wires, station buildings, depots, etc., and personal property of the value in each year in said county of $1,950, and that said line of road was during each of said years operated as a part of the system of the Atchison, Topeka & Santa Fe Railroad Company, running from Chicago, in the State of Illinois, to the city of El Paso, in the State of Texas, and the portion thereof in said county was a broad-gauge road which owing to its condition was at least $3,000 a mile in said county greater actual value than was that portion of the Atlantic & Pacific railroad in said county at that time. That in the year 1892, the entire property of the said New
298 Mexico & Southern Pacific Railroad Company in said county was finally assessed at $142,262.43, and in the year 1893 at $142,142.50, and in the year 1894 at $142,142.50, and in the year 1895 at $151,354.00 and in the year 1896 at $151,354.00. That during said years there was on the right of way of the Atlantic & Pacific railroad a telegraph line in which said company was interested, carrying only two wires. That the above-named railroad companies were the only railroad companies having any line of railroad in said county during said years; that during said years there was built and maintained in said county, as side tracks, for the Atlantic &

Pacific Railroad Company only 3.433 miles, being not quite three and a half miles.

All of which said several matters and things hereinabove stated and set forth the said United States Trust Company of New York, and the said C. W. Smith, late receiver, jointly and severally aver to be true, and that they each jointly and severally plead the same to the said intervening petition as and for a bar thereof, and as a bar to the recovery of any of the taxes alleged to be due upon any assessment made by the collector of Valencia county on the tax-rolls of 1896 of said county on the 7th day of June, 1897, and that they and each of them, jointly and severally humbly crave the judgment of this court whether they be compelled to make any other or further answer to the said intervening petition.

C. N. STERRY,
Solicitor and Counsel for the United States Trust Company of New York and C. W. Smith, Late Receiver in This Cause.

299 I hereby certify that the foregoing plea in bar is in my opinion well founded in point of law.

C. N. STERRY,
Solicitor and Counsel for the United States Trust Company of New York and C. W. Smith, Late Receiver in This Cause.

TERRITORY OF NEW MEXICO, }
County of Bernalillo, } ss:

C. N. Sterry being duly sworn, deposes and says: That he is the sole solicitor and counsel for the said C. W. Smith, as receiver, and the said United States Trust Company of New York, in the proceedings in which the above and foregoing plea in bar is filed. That the said C. W. Smith, receiver, resides at Pasadena, Los Angeles county, California, and that the said United States Trust Company of New York has its residence and principal place of business in the city of New York, State of New York, and that neither one of said parties herein named to affiant's knowledge is within the territorial limits of the Territory of New Mexico at the time when this affidavit is made, or this plea in bar filed. Affiant further says that the foregoing plea in bar is not interposed for delay; that each and every of the facts stated in the foregoing plea are true to the best of affiant's information, knowledge and belief.

C. N. STERRY.

Subscribed and sworn to before me this 30th day of September, A. D. 1899.

[SEAL.] KARL A. SNYDER,
Notary Public.

EXHIBIT No. 1.

List of real estate of the Atlantic and Pacific Railroad Company, situate in the county of Valencia and Territory of New Mexico, listed by the said company for the fiscal year 1892, under protest, and with the express understanding that said company by making said list does not in any manner waive its right to exemption from taxation under the act of Congress whereby it was created, and asserts that all of the real estate herewith listed, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, and the structures placed thereon or attached thereto for the purpose of operating and maintaining said road and transacting and carrying on its business, are and were by the second section of said act of Congress, expressly exempted from taxation within the territories of the United States:

The right of way for said railroad, one hundred feet on each side thereof, commencing at station 249–13, the point where said railroad enters said county of Valencia from the northeast, and at the dividing line between the county of Valencia and the county of Bernalillo on the east, thence in a westerly direction 93.458 miles to the northern boundary line of said county of Valencia, at station 5247, together with all the ties, iron and steel rails, fish-plates, bolts, spikes, grades, cuts, fills, bridges, culverts and other material constituting and composing the road-bed, track and railroad of said company, together with the telegraph line erected upon and constructed over said right of way, $327,103.00.

All necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, together with the fixed and permanent improvements placed thereon and attached thereto for the purpose of operating and maintaining said railroad, to wit:

Rio Puerco	$1,888 00
San Jose	541 00
El Rito	677 00
Laguna (Indian reservation)	2,145 00
Cubero	682 00
McCarty's (Indian reservation)	1,383 00
Grant's	3,150 00
Bluewater	1,316 00
	$11,782 00
Total value of right of way	327,103 00
Grand total	$338,885 00

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

I, C. N. Sterry, do solemnly swear that I am the general attorney of the Atlantic and Pacific Railroad Company, and that, to the best of my knowledge and belief, the above and foregoing contains a full, true and correct statement of all the real estate owned, claimed by, or in the possession or under the control of the Atlantic and Pacific Railroad Company in the county of Valencia, Territory of New Mexico, not already listed; that I am informed that the same and each and every part and parcel thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations, and the structures, buildings and improvements placed thereon for the purpose of operating and maintaining said road and carrying on the business thereof, are, and were by the said act of Congress incor-
302 porating said company, exempt from taxation within the county of Valencia.

C. N. STERRY.

Subscribed and sworn to before me this 19th day of April, A. D. 1892.

[SEAL.] KARL A. SNYDER,
Notary Public.

Exhibit No. 2.

Assessment-roll for Valencia County, 1892.

	Name of property-owner.	Precinct No.	Real estate.										Value of land.	Value of improvements.	Total value of land & improvements.	Value of cattle.	Val. of per. property	Deductions.
			Fraction or other description.	Section.	T'nship.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.	Add'on.						
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22	Atlantic & Pacific R. R. Co.																	
23	Grant-d lands as per list on file						157,648.04	.20					$31,529 61		$31,529 61	$2,004 99		
24	Personal property as follows:																	
25	Rio Puerco, 1st															1,888 00		
26	El Rito, 3d															541 00		
27	Laguna, 4th															677 00		
28	Cubero, 6th															2,145 00		
29	McCarty's, 7th															682 00		
30	Grant's, 8th															1,383 00		
31	Bluewater, 9th															3,150 00		
32	San Jose, 2d															1,316 00		
33	Total value of right of way														327,103 00			
34																		

EXHIBIT No. 3.

Territory of New Mexico, for 1892.

	Fixed by assessor.	Fixed by county commissioners.	Fixed by ter. board equalizat'n.	Final assessed value.	Territorial tax.				County tax.								City tax.				Total tax.
					For territorial purposes.	Territorial institutions.	Capitol bonds.	Insane asylum.	School tax.	General tax.	County additional.	Interest funded debt, '82 and '83.	Sinking-fund bonds, '82 & '83.	Interest funded debt, '85.	Interest funded debt, '89.	Interest current-exp-nse bonds.	Road and bridge.	Unpaid interest funded debt.	Cattle indemnity.	Total.	
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Dollars, cents, and mill (\$ c. m.) marks omitted.

305 EXHIBIT No. 3.

(The following on a printed blank is pasted in the back of the book:)

Oath of Assessor.

I, A. M. Bergere, assessor of the county of Valencia, Territory of New Mexico, do solemnly swear that during the whole time allowed by law to make this assessment, I have made diligent inquiry and examination to ascertain all the property within said county, subject to taxation, and that I have assessed it on the assessment book equally and uniformly to the best of my judgment, information and belief, at its full cash value, and that I have faithfully complied with all the duties imposed upon the assessor by the revenue laws of the Territory, and that I have not imposed any unjust assessment through malice or ill-will, nor allowed any one to escape a just and equal assessment through favor or reward, so help me God.

A. M. BERGERE, *Assessor.*

Sworn to and subscribed before me this 5th day of Septtember, A. D. 1892.

CARLOS BACA,
Clerk of the Board of County Commissioners.

Office of the board of county commissioners, Valencia county.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

At a regular session, held on the 5th day of September, A. D. 1892—

It is ordered by the board of county commissioners of the said county: That the preceding assessment-roll, and each and every assessment therein contained, as originally returned and assessed or as
306 shown therein to have been revised and corrected by the board, be and the same is hereby approved.

And that a tax of 11.25 mills upon each dollar of taxable property for county purposes, and of three mills on the dollar for school purposes, and 7.65 mills for various territorial funds, to wit:

For territorial purposes fixed by the act of the legislative assembly, approved February 26, 1891, 6.50 mills on the dollar; for territorial institutions, act of February 28, 1889, 1 mill on the dollar; for interest on the capitol bonds, $\frac{10}{100}$ mills on the dollar; insane asylum bonds, $\frac{5}{100}$ mills on the dollar. Total levy for all territorial purposes, 7.65 mills on the dollar; cattle indemnity fund $\frac{50}{100}$ mills on the dollar on the appraised value of all cattle; is hereby levied upon all the property therein returned assessed liable to taxation. And it is further ordered that the assessor of the county enter the several said rates of taxes upon the tax-roll for the year 1892, and that upon the delivery of the tax-roll to the county collector, the county clerk

shall charge said collector with the aggregate amount of said several taxes as provided by law.

To the sheriff and *ex officio* collector of the county of Valencia, in said Territory, Greeting:

You are hereby commanded, in accordance with the laws of said Territory, in such cases made and provided, to collect all territorial, county, school, city and all other taxes above enumerated and specified, levied on the citizens of said county, and non-resident property-owners whose property may have been assessed in your county, and all taxes assessed upon property within said county as appears from the tax-list of said county for the year 189–, being
307 the foregoing tax-list, and the delinquent tax-lists of said county for previous years, and also that you collect all interest due on delinquent taxes as provided by the laws of said Territory.

In witness hereof we have hereunto set our hands and caused the seal of said board to be hereunto affixed, attested by the clerk of said board, this 5th day of September, A. D. 1892.

SILVESTRE MIRABAL,
Chairman of Board.
NESTOR JARAMILLO,
JUAN JOSE BENAVIDES,
Commissioners.

Attest: CARLOS BACA,
Probate Clerk and ex Officio Clerk of the Board of County Commissioners.

SEPTEMBER 5, A. D. 1892.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

Received of A. M. Bergere, assessor of said county, the tax-lists or assessment-rolls of said county for the year 1892, which amounts to $47,005.00, territorial, school and county funds, viz:

For territorial purposes	$13,910 85
" " institutions	2,140 13
" interest on capitol bonds	214 01
Insane asylum bonds	107 00
For school fund	6,420 40
General tax (county)	5,350 32
County additional	1,070 06
Interest on bonds '82 and '83	5,253 00
" " '85	342 42
Interest on bonds '89	4,750 09
308 Interest on current expense bonds	642 03
Road and bridge fund	1,070 06
Unpaid interest due 1892	3,317 20
Cattle indemnity fund	136 17
Total	$47,005 00

Witness my hand this 5th day of September, A. D. 1892.

TRANQUILINO LUNA,
Sheriff and ex Officio Collector in and for said County.

EXHIBIT No. 4.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting to Hear and Determine Causes Arising under the Constitution and Laws of the United States.

THE MERCANTILE TRUST COMPANY, Complainant, }
vs. }
ATLANTIC AND PACIFIC RAILROAD CO., Defendant. }

To the Hon. Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof, in chancery sitting:

Your petitioner, Solomon Luna, sheriff and *ex officio* collector of taxes and licenses for the county of Valencia in the Territory of New Mexico, respectfully shows unto your honor that in accordance with the laws of the Territory of New Mexico in such cases made and provided the taxing office of the county of Valencia aforesaid, did levy and assess the property of the defendant, The Atlantic and Pacific Railroad Company, situated and being in said county,
309 taxes for territorial and county purposes for the year 1892, amounting to the sum of $8,501.24.

Your petitioner further shows unto your honor that in like manner, a tax amounting to the sum of $14,706.16 was levied and assessed upon the property of the Atlantic and Pacific Railroad Company for the year 1893.

Your petitioner further shows unto your honor that at the times prescribed by law in each of the said years, 1892 and 1893, the tax-roll for the county of Valencia aforesaid, duly certified as required by law, was placed in the hands of your petitioner and your petitioner thereby became charged with the duty of collecting from the said Atlantic and Pacific Railroad Company, the taxes so levied and assessed against it, and your petitioner is advised by counsel and believes and therefore charges the fact to be, that the levy and assessment of the said taxes created a lien upon all the property of the said defendant, The Atlantic and Pacific Railroad Company within the county of Valencia aforesaid, prior and superior to all other liens and incumbrances; which lien it was the duty of your petitioner to enforce by seizure of the property of the said defendant, The Atlantic and Pacific Railroad Company, and sale thereof or sufficient amount thereof to satisfy the said taxes, together with interest and penalties which have accrued thereon.

Your petitioner further shows unto your honor that heretofore, to wit, on the — day of April, 189–, your petitioner being then and

there about to proceed to the enforcement of the payment of the said taxes so levied and assessed against the said defendant,
310 The Atlantic and Pacific Railroad Company, the said defendant filed in this honorable court its bill of complaint, seeking to enjoin your petitioner from so enforcing the payment of said taxes, and while the said bill of complaint was pending and undetermined in this honorable court, and before your petitioner was able to proceed in the manner prescribed by law to the enforcement of the payment of said taxes, this proceeding by the Mercantile Trust Company was begun in this honorable court, and J. W. Reinhart, John J. McCook and Joseph C. Wilson were on the 5th day of January, 1894, appointed by this honorable court, receivers therein, and under and by virtue of such appointment took possession of all of the property of said defendant; and now control and operate the same as such receivers under the orders of this honorable court.

Your petitioner further shows unto your honor that he is advised by counsel and believes and therefore charges the fact to be, that by reason of the appointment of the said receivers in this proceeding, your petitioner is prevented from proceeding in the manner prescribed by law to enforce the collection of the said taxes so levied and assessed against the said defendant, The Atlantic and Pacific Railroad Company, but your petitioner is likewise advised that it is the duty of the said receivers to pay the said taxes out of any moneys in their hands belonging to the said defendant, but nevertheless the said receivers deny their liability to pay the said taxes so levied and assessed, and have refused and still refuse to pay the same, although thereunto requested by your petitioner.

Your petitioner further shows unto your honor that it is
311 impracticable to file with this petition, a copy of the tax-rolls of the county of Valencia, but your petitioner files herewith extracts therefrom showing the levy and assessment of said taxes against the defendant, The Atlantic and Pacific Railroad Company, and now here offers to produce when and where this honorable court shall direct, the original tax-rolls for the inspection of the said receivers if thereunto required.

Your petitioner shows unto your honor that it is the manifest duty of the said receivers to pay the said taxes so levied and assessed for the years 1892 and 1893, but inasmuch as the said receivers refuse to pay the same, your petitioner is without remedy except in this proceeding.

Wherefore, your petitioner prays that the said receivers may be ordered to pay to your petitioner, all unpaid taxes levied and assessed against the Atlantic and Pacific Railroad Company for the years 1892 and 1893, and that your petitioner may have such other and further relief in the premises as equity may require and to your honor may seem meet.

(Signed) SOLOMON LUNA,
Sheriff and ex Officio Collector of Taxes and Licenses, Valencia County, N. M.

(Signed) NEILL B. FIELD,
Solicitor for Petitioner.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

Solomon Luna being first duly sworn, upon his oath deposes and says: That he has read the foregoing petition and knows the contents thereof; that the allegations therein are true of his own knowledge, except as to so much and such parts thereof as are made upon
312 information and belief; and as to those allegations he believes the same to be true.

(Signed) SOLOMON LUNA.

Subscribed and sworn to before me this 2d day of June, A. D. 1894.

[SEAL.] (Signed) S. BURKHART,
Notary Public.

Filed in my office this 4th day of June, 1894.

O. N. MARRON, *Clerk.*

Extracts from assessment-rolls of Valencia county filed with petition of Solomon Luna:

	Name of property-owner.	Precinct No.	Fraction or other description.	Section.	Township.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.	Addition.	Value of land.	Value of improvements.	Total val. of land & improvements.	Value of cattle.	Value of personal property.	Deductions.
1	Atlantic & Pacific R. R. Company.																	
2	Granted lands as per list on file						157,648.04	.20					$31,529 61		$31,529 61		$2,004 99	
3	Personal property as follows:																	
4	Rio Puerco, 1st																1,888 00	
5	El Rito, 2nd																541 00	
6	Laguna																677 00	
7	Cubero																2,145 00	
8	McCarty's																682 00	
9	Grant's																1,383 00	
10	Bluewater																3,150 00	
11	San Jose																1,316 00	
12	Total value of right of way														327,103 00			
13																		
14																		
15																		
16																		

1893.

17	Atlantic & Pacific R. R. Company.																	
18	Granted lands as per list on file						169,167.48	.20					33,833 50				2,004 99	Raised by Co. com-issioners. $16,916 75
19			Rio Puerco station										1,888 00					
20			San Jose										541 00					
21			El Rito										677 00					
22			Laguna										2,145 00					
23			Cubero										682 00					
24			McCarty's										1,383 00					
25			Grant's										3,150 00					
26			Bluewater										1,316 00					
27			Total value of right of way												327,103 00			Final assessed value. $391,640 24
28																		
29																		
30																		
31																		
32																		
33																		
34																		

	Fixed by assessor.	Territorial taxes. Fixed by county rates.	Fixed by territorial board of equalization.	Final assessed value.	Fortified total purpose.	Territorial institution.	Insane asylum.	School tax.	County tax. General tax.	County additional.	Interest funded debt.	Interest funded debt, '82.	Interest funded debt, '82, '84.	City tax. Interest current expenses bonds.	Road and bridge.	Sinking fund bonds, '82, '84.	Funded interest tuned debt.	Cattle indemnity.	Total.	Total tax.
1																				
2																				
3																				
4																				
5		47,204 41																		
6																				
7																				
8																				
9																				
10																				
11																				
12																				
13		388,184 40		388,184 40	2,523 21	388 18	38 86	19 40	1,164 55	970 46	194 09	62 10	601 76	116 46	194 09	776 37	601 68			8,501 24
14		.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

1893.

	Territorial purposes.	Special deficit 4th Sess. cal yr.	Normal schools.	Normal institutes.	Branch agrl. exper. stations.	Casual deficit bonds interest.	Territorial institutions.	Cattle indemnity.	School fund.	General fund.	County additional.	County court fund.	Road and bridge.	Interest bonds '82, '84.	Interest bonds '82.	Interest bonds, '89.	Tmpaid interest current expense.	Interest current expense bonds.	Sinking fund.		Total tax.
16																					
17																					
18																					
19																					
20																					
21																					
22																					
23																					
24																					
25																					
26																					
27																					
28																					
29																					
30	2,340 84	881 19	176 24	19 58	97 91	97 91	685 37	.....	725 28	979 10	195 82	1,958 20	195 82	681 19	1,253 25	1,762 35	979 10	234 96	1,174 92	.....	14,706 18
31																					
32																					
33																					
34																					

Dollar, cent, and mill ($ c. m.) marks omitted.

315 EXHIBIT No. 5.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting to Hear and Determine Causes Arising under the Constitution and Laws of the United States.

THE MERCANTILE TRUST COMPANY, Complainant,
vs.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY, Defendant.

To the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof, in chancery sitting:

Solomon Luna, sheriff and *ex officio* collector of taxes and licenses for the county of Valencia, in the Territory of New Mexico, by leave of the court first had and obtained, amends his petition heretofore filed in this cause and reiterating and reaffirming all the allegations of his original petition herein, the said petitioner shows to the court that while it is true that the Atlantic and Pacific Railroad Company, by C. N. Sterry its general attorney, who at that time had charge for said company to look after the assessment and taxation of said company and its property, in the Territory of New Mexico, made and returned to the assessor of Valencia county, Territory of New Mexico, the return set up in the answer of the said receivers herein, a copy of which is attached to and made a part of said answer, marked "Exhibit B," and while it is also true that there was excepted from the return so made to the said assessor the list of the real estate owned by the Atlantic and Pacific Railroad Company in the county of Valencia, Territory
316 of New Mexico, which consisted entirely of the land granted by the Government of the United States to the Atlantic and Pacific Railroad Company, outside of its right of way in said county and Territory; it is also true that within what is described in the said "Exhibit B," as the right of way of the said Atlantic and Pacific Railroad Company, in the county of Valencia, the said company is the owner in fee-simple of a tract of land about 200 feet wide and about 60 miles long, that is to say; that your petitioner is informed and believes that the entire length of the main line of the Atlantic and Pacific Railroad Company in the county of Valencia, is 95.458 miles, and that as to about 33 miles of said length and no more, the lands covered by the said railroad in the said county of Valencia, in said Territory of New Mexico were part of the public domain at the time of the passage of the act incorporating the said railroad company, and as to all of the lands covered by the said railroad, except the said 33 miles, the same and every part thereof was held in private ownership at the time of the passage of the said act incorporating the said Atlantic and Pacific Railroad Company;

and your petitioner is informed and believes that the said Atlantic and Pacific Railroad Company acquired title thereto by gift, purchase or adverse possession under the provision of section 7, of the said act of incorporation, which title your petitioner is informed and believes is and was at the time of the assessment and taxation thereof, an absolute fee-simple title, and the same and all improvements, thereon, are and were at said time, real estate, and subject to taxation as such in the Territory of New Mexico, and that no part thereof was or is exempt from such taxation.

317 Your petitioner is advised by counsel and believes, and therefore charges the fact to be, that as to so much of the said track of the said Atlantic and Pacific Railroad Company as traversed and crossed what was part of the public domain of the United States, the said Atlantic and Pacific Railroad Company acquired by section 2, of the said act of incorporation, an easement therein, which by the terms of the said act of incorporation was and is exempt from taxation in the Territory of New Mexico, but your petitioner is advised by counsel and believes, and therefore charges the fact to be, that while the said easement so acquired by virtue of the said grant was exempt from taxation in the Territory of New Mexico, the improvements and betterments thereof were and are no part of the said easement, and were not and are not exempt from taxation by the said provision of the said act of incorporation.

Your petitioner is further advised by counsel, and believes and so charges the fact to be, that by the laws of the Territory of New Mexico, the improvements of the said Atlantic and Pacific Railroad Company upon that portion of the public domain over and upon which the said easement was so acquired, are and were subject to taxation in the Territory of New Mexico, and your petitioner charges that the taxes levied and assessed upon the property of the said Atlantic and Pacific Railroad Company, in the county of Valencia, Territory of New Mexico, which your petitioner seeks to have paid in this proceeding, were and are levied upon and assessed against the said property so subject to taxation as aforesaid, and the same were not nor was any part thereof levied or attempted to be

318 assessed against the said easement of the said company which was so exempt by the said terms of the said act of Congress.

Your petitioner further shows unto your honor that the said taxing officers of the said county of Valencia, in the Territory of New Mexico, accepted a description of the said property, and the valuation thereof, as fixed by the agents of the said Atlantic and Pacific Railroad Company, although the said description might have been made more definite and certain, and the said valuation was below the actual value of the said property of the said Atlantic and Pacific Railroad Company for the purposes of taxation, and your petitioner is advised that the said Atlantic and Pacific Railroad Company and these receivers are estopped to deny the sufficiency of the said description, or the fairness of the said valuation; and that your petitioner is informed and believes, and so charges the fact to be, that the value of the road-bed of the said Atlantic and Pacific Railroad Company in the said county of Valencia, to which the company

owns a fee-simple title, together with the value of the cuts and fills thereon and the cross-ties, rails, fish-plates, bolts, and other improvements thereon, and annexed thereto, together with the improvements of a like nature affixed to the soil and used by the said company in connection with the said easement, is of the value, to wit, of not less than one million dollars, and the amount of taxes sought to be collected in this proceeding is much less than the fair and equitable amount of taxes which should be paid by the said Atlantic and Pacific Railroad Company.

Your petitioner is further advised by counsel that under the provision of the laws of New Mexico in such cases made and
319 provided, he is fully authorized and empowered to correct any mere clerical errors in the entries of said assessment upon the tax-rolls of the county of Valencia; and your petitioner hereby offers if required so to do, to correct any such errors as may be pointed out in the said entries, and your petitioner prays as in his original petition, and will ever pray, etc.

SOLOMON LUNA,
Sheriff and ex Officio Collector of Taxes and Licenses, Valencia County, New Mexico.

NEILL B. FIELD,
Solicitor for Petitioner.

TERRITORY OF NEW MEXICO, }
County of Bernalillo, } ss:

Solomon Luna, being first duly sworn, upon his oath deposes and says, that he has read the foregoing amended petition and knows the contents thereof, that the allegations therein contained are true of his own knowledge, except as to so much and such parts thereof as are made upon information and belief, and as to these allegations he believes the same to be true.

SOLOMON LUNA.

Subscribed and sworn to before me this 13th day of December, A. D. 1894.

[SEAL.]

FELIX H. LESTER,
Notary Public.

EXHIBIT No. 6.

Additional Assessment for the Year Eighteen Hundred and Ninety-two.

The following was omitted in the assessment of the year 1892 and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

320	The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile	$214,500
	Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile	$394,550
	Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station	1,800
	Station-houses, depots, switches, water tanks, and all other improvements at San Jose station	540
	Station-houses, depots, switches, water tanks, and all other improvements at El Rito station	600
	Station-houses, depots, switches, water tanks, and all other improvements at Laguna station	2,100
	Station-houses, depots, switches, water tanks, and all other improvements at Cubero station	600
321	Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station	1,300
	Station-houses, depots, switches, water tanks, and all other improvements at Grant's station	3,100
	Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station	1,300
		$11,340

Exhibit No. 6.

Assessment-roll for Valencia County, Territory of New Mexico, for 1896.

Name of property-owner.	Prec'et No.	Real estate.									Value of land.	Value of improvements.	Total value of land & improvements.	Value of cattle.	Val. of per. property.	Deductions.	Fixed by assessor.	Fixed by county commissioners.	Fixed by ter. bd. equalization.	Final assessed value.
		Fraction or other description.	Section.	T'nship.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.										
Atlantic and Pacific Railroad Company												620,380								

Exhibit No. 6 (Continued).

Territorial tax.				County tax.														
Territorial purposes.	Territorial institutions.	Capitol bonds.	Territorial insane asylum.	County schools.	General fund.	County, additional.	Interest, 1882 and 1883.	Sinking-fund bonds.	Interest, 1885.	Interest, 1889.	Court-expense bonds.	Road-and-bridge fund.	Unpaid interest.		Total.	Amount due January 1st, 1897.	Amount due July 1st, 1897.	Penalty.	Total tax.
4,032.54	620.39	62.03	31.01	1,861.17	1,550.98	310.20	942.99	1,240.78	99.26	1,377.27	186.12	310.20	961.60	.....	.....	.....	.....	.....	13,580.54

Dollars, cents, and mill ($ c. m.) marks omitted.

EXHIBIT No. 7.

Assessment-roll for Valencia County, Territory of New Mexico, for 1893.

	Name of property-owner.	Precinct No.	Real estate.									Value of land.	Value of improvements.	Total value of land & improvements.	Value of cattle.	Val. of per. property.	Fixed by assessor.	Deductions.	Fixed by county commissioners.	Fixed by ter. board equalization.	Final assessed value.
			Fraction or other description.	Section.	Township.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.										
1																					
2																					
3																					
4																					
5																					
6																					
7																					
8																					
9																					
10																					
11																					
12																					
13																					
14																					
15																					
16																					
17																					
18																					
19																					
20																					
21																					
22	Atlantic & Pacific R. R. Co.																		Raised by county commissioners.		
23	Grant-d lands as per list filed						109,167.48	.20				$33,833.50				2,004.99			$16,916.75		
24			Rio Puerco station													1,888.00					
25			San Jose													541.00					
26			El Rito													677.00					
27			Laguna													2,145.00					
28			Cubero													682.00					
29			McCarty's													1,383.00					
30			Grant's													3,150.00					
31			Bluewater													1,316.00					
32			Tot. val. right of way											327,103.00							391,640.24
33																					
34																					

Exhibit No. 7 (Continued).

| | Territorial tax. | | | | | | | | | | | | | | County tax. | | | | | | | | | | | | | | City tax. | | | | | | | | | | | | | |

326 *Oath of Assessor.*

I, Franco Chavez y Armijo, assessor of the county of Valencia, Territory of New Mexico, do solemnly swear that during the whole time allowed by law to make this assessment, I have made diligent inquiry and examination to ascertain all the property within said county, subject to taxation, and that I have assessed it on the assessment book equally and uniformly to the best of my judgment, information and belief, at its full cash value, and that I have faithfully complied with all the duties imposed upon the assessor by the revenue laws of the Territory, and that I have not imposed any unjust assessment through malice or ill-will, nor allowed any one to escape a just and equal assessment through favor or reward, so help me God.

FRANCO CHAVEZ Y ARMIJO.

Sworn to and subscribed before me this 18th day of September, A. D. 1893.

M. LUNA,
Probate Clerk, etc.

Office of board of county commissioners.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

At a regular session, held on the 6th day of July, A. D. 1893—

It is ordered by the board of county commissioners of said county: That the preceding assessment-roll, and each and every assessment therein contained, as originally returned and assessed or as shown therein to have been revised and corrected by the board, be and the same is hereby approved.

And that a tax of 1.73 of one per cent. for county purposes,
327 and of two mills on the dollar for school purposes, and of .05 mills on the dollar for court fund, and 1.10 per cent. for various territorial funds, to wit:

Fifty one-hundredths mills for cattle indemnity fund; for territorial purposes, 6 mills on the dollar; for special deficit levy for 44th fiscal year, 2.25 mills on the dollar; for normal school fund, $\frac{45}{100}$ mills on the dollar; for normal school institutes fund $\frac{5}{100}$ mills on the dollar; for branch agricultural experiment stations fund, $\frac{25}{100}$ mills on the dollar; for casual deficit bonds interest fund, $\frac{25}{100}$ mills on the dollar; for territorial institutions fund, 1.75 mills on the dollar; for cattle indemnity fund on the appraised value of cattle, $\frac{50}{100}$ mills on the dollar, is hereby levied upon all the property therein returned assessed liable to taxation.

And it is further ordered that the county assessor extend the several said rates of taxes upon the tax-roll for the year 1893, and that upon the delivery of the tax-roll to the county collector the clerk of the board shall charge said collector with the aggregate amount of said taxes as provided by law:

To the sheriff and *ex officio* collector of Valencia county, in said Territory, Greeting:

You are hereby commanded, in accordance with the laws of said Territory, in such cases made and provided, to collect all the territorial, county, school, city and all other taxes above enumerated and specified, levied on the citizens of said county, and non-resident owners, whose property may have been assessed in your county, and all taxes assessed upon property within your county as appears from the tax-list of said county for the year 1893, being the foregoing tax-list, and the delinquent tax-lists of said county for the pre-
328 vious years, and also that you collect all interest due on delinquent taxes as provided by the laws of said Terrritory.

In witness whereof we have hereunto set our hands and caused the seal of said board to be hereunto affixed, attested by the clerk of said board, this 6th day of July, A. D. 1893.

CARLOS BACA,
Chairman of Board.
MANUEL S. SANCHEZ,
Commissioner.

Attest: M. LUNA,
Probate Clerk and ex Officio Clerk of the Board of County Commissioners.

——, N. M., A. D. 189–.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

Received of Maximiliano Luna, probate clerk and *ex officio* clerk of the board of county commissioners of said county, the tax-lists or assessment-rolls of said county for the year 1893, which amount to $63,035.89 territorial, school and county funds, viz:

For territorial purposes	$10,698 80
For special deficit levy for 44th fiscal year	4,012 80
For normal school fund	802 60
For normal school institutes fund	88 96
For branch agricultural experimental stations fund	446 13
For casual deficit bonds interest fund	446 13
For territorial institutions fund	3,121 13
For cattle indemnity fund	79 52
For school fund	3,566 63
For general fund	4,459 27
For court fund	8,917 36
For county additional fund	892 32
For road and bridge fund	892 32
For interest on bonds 1882 and 1883	4,012 80
329 For interest on bonds 1885	5,706 51
For interest on bonds 1889	8,025 16
For unpaid interest fund	446 13
For interest on current expense bond fund	1,070 35
For sinking fund	5,350 70

Witness my hand this 18th day of September, A. D. 1893.

SOLOMON LUNA,

Sheriff and ex Officio Collector in and for said County.

EXHIBIT No. 8.

Additional Assessment for the Year Eighteen Hundred and Ninety-three.

The following was omitted in the assessment of the year 1893, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile..... $214,500

Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county
330 of Valencia and constituting "improvements" upon the land embraced within the said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per miles..... $394,550.

Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station.....	$1,800
Station-houses, depots, switches, water tanks, and all other improvements at San Jose station.....	540
Station-houses, depots, switches, water tanks, and all other improvements at El Rito station.....	600
Station-houses, depots, switches, water tanks, and all other improvements at Laguna station.....	2,100
Station-houses, depots, switches, water tanks, and all other improvements at Cubero station.....	600
Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station.....	1,300
Station-houses, depots, switches, water tanks, and all other improvements at Grant's station.....	3,100
Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station.....	1,300
	$11,340

EXHIBIT No. 8.

Assessment-roll of Valencia County, Territory of New Mexico, for 1896.

Name of property-owner.	Prec't No.	Real estate.									Value of land.	Value of improvements.	Total value of land & improvements.	Value of cattle.	Val. of per. property.	Deductions.	Fixed by assessor.	Fixed by county commissioners.
		Fraction or other description.	Section.	Township.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.								
Atlantic & Pacific Railroad Company.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	620,390						

Exhibit No. 8 (Continued).

Territorial tax.							County tax.													
Territorial purposes.	Special deficit.	Normal schools.	Normal institutions.	Branch ag'l exp. station.	Casual deficit bonds interest.	Territorial institutions.	School.	County general.	Court fund.	Road and bridge fund.	County additional.	Interest, 1882 and 1883.	Interest, 1885.	Interest, 1889.	Unpaid interest.	Interest on curr't ex. bonds.	Sinking fund.	Amount due January 1st, 1897.	Amount due July 1st, 1897.	Penalty.	Total tax.
3,722.34	1,395.88	248.16	31.02	155.10	155.10	1,085.68	1,240.78	1,550.98	3,101.95	310.20	310.20	1,395.88	1,985.25	2,791.76	1,550.98	327.23	1,861.17	.....	.....	.....	23,264.66

Dollars, cents, and mill- ($ c. m.) marks omitted.

Exhibit No. 9.

Assessment-roll of Valencia County, Territory of New Mexico, for 1894.

Name of property-owner.	Precinct No.	Real estate. Fraction or other description.	Section.	Township.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.	Value of land.	Value of improvements.	Total value of land & improvements.	Value of cattle.	Val. of per. property.	Deductions.	Fixed by assessor.	Fixed by county commissioners.	Fixed by ter. board equalization.	Final assessed value.
Atlantic & Pacific Railroad Co.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	2,994.99	.....				
Lands as per itemized list	.....	.....	.....	.....	.....	160,167.48	.50	.....	.....	.....	.....	.....	.....	.....	.....	.....	84,583.74			
93.458 miles main track at $6,500.00.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	607,477.00			
		Rio Puerco station..	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	2,289.00			
		San Jose "	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	541.00			
		El Rito "	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	842.00			
		Laguna "	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	4,925.00			
		Cubero "	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	703.00			
		McCarty's "	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	1,045.00			
		Grant's "	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	3,150.00			
		Bluewater "	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	4,757.30			
																				711,414.73

334

EXHIBIT No. 9 (Continued).

| | Territorial tax. | | |

335 TERRITORY OF NEW MEXICO, }
County of Valencia. }

Office of board of county commissioners.

At a regular session held on the second day of July, 1894—

It is ordered by the board of county commissioners of said county: That the preceding assessment-roll and each and every assessment therein contained as originally returned and assessed, or as shown thereon to have been revised and corrected by the board, be and the same is hereby approved.

And that a tax of 2.025 of one per cent. for county purposes and of two mills on the dollar for school purposes and of 6 mills on the dollare for court fund, and 7.75 for various territorial funds, to wit: For territorial purposes 6 mills on the dollar; for casual deficit bonds interest funds, $\frac{25}{100}$ mills on the dollar; for territorial institutions fund, 1.50 mills on the dollar; for cattle indemnity fund, $\frac{50}{100}$ mills on the dollar of the appraised value of all cattle, is hereby levied upon all the property therein returned assessed liable to taxation.

(Then follows order to assessor to extend the several said rates of taxes upon the tax-roll for the year 1894, and that upon delivery of tax-roll to county collector the clerk of the board charge said collector with the aggregate amount of said several taxes as provided by law. Then follows warrant to sheriff and *ex officio* collector to collect taxes.)

(Signed) CARLOS BACA,
Chairman of the Board.
DESIDERIO SANDOVAL,
MANUEL S. SANCHES,
Commissioners.

336 Then follows receipt of Solomon Luna for tax-list, dated Oct. 1, 1894.

TERRITORY OF NEW MEXICO, }
County of Valencia, } *ss:*

I, the undersigned, probate clerk and *ex officio* clerk of the board of county commissioners, do hereby certify that the above books were further approved at a meeting held on the 15th day of October, 1894, on which date the books were reported corrected in accordance with a certain mandamus issued by the district court of the second judicial district ordering an additional levy of three-fourth- ($\frac{3}{4}$) of one mill on each dollar of taxable property to satisfy a certain judgment of Michaelis Fischer for two thousand and twenty dollars and seventy-seven cents ($2,020.77) said mandamus bearing date of October 4th, 1894.

Witness my hand and official seal of the board of county commissioners this 15th day of October, A. D. 1894.

M. LUNA,
Clerk Board of Co. Comm'rs.

Exhibit No. 10.

Additional Assessment for the Year Eighteen Hundred and Ninety-four.

The following was omitted in the assessment of the year 1894, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land
337 embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile..... $214,500

Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile..... $394,550

Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station..... $2,289

Station-houses, depots, switches, water tanks, and all other improvements at San Jose station..... 541

Station-houses, depots, switches, water tanks, and all other improvements at El Rito station..... 842

Station-houses, depots, switches, water tanks, and all other improvements at Laguna station..... 4,025

Station-houses, depots, switches, water tanks, and all other improvements at Cubero station..... 700

Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station..... 1,045

338 Station-houses, depots, switches, water tanks, and all other improvements at Grant's station..... .. 3,150

Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station..... 4,757

$17,349

EXHIBIT No. 10 (Continued).

Assessment-roll of Valencia County, Territory of New Mexico, for 1896.

Name of property-owner.	Precinct No.	Real estate.												Value of land.	Value of improvements.	Total value of land and improvements.	Value of cattle.	Val. of per. property.	Deductions.	Fixed by assessor.	Fixed by county commissioners.	Fixed by ter. bd. equalization.	Final assessed value.
		Fraction or other description.	Section.	Township.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.													
Atlantic and Pacific Railroad Company															626,399.								

Exhibit No. 10 (Continued).

	Territorial tax.			County tax.																	
	Territorial purposes.	Territorial institutions.	Casual deficit.	School.	General.	Court fund.	County additional.	Road and bridge fund.	Interest, 1882 and 1883.	Interest, 1885.	Interest, 1888.	Unpaid interest.	Interest on curr't ex. bonds.	Sinking fund.		Judgment fund.	Amount due January 1st, 1897.	Amount due July 1st, 1897.	Penalty.	Total tax.
	3,758.39	939.00	156.60	1,252.80	1,566.00	3,758.39	313.20	312.20	1,409.40	1,879.20	5,131.99	1,566.00	626.39	1,879.20	469.80	.....	.....	.....	.....	23,020.16

Dollars, cents, and mill ($ c. m.) marks omitted.

EXHIBIT No. 11.

Assessment-roll of Valencia County, Territory of New Mexico, for 1895.

Name of property-owner.	Precinct No.	Real estate.									Value of land.	Value of improvements.	Total value of land & improvements.	Value of cattle.	Val. of per. property.	Deductions.	Fixed by assessor.	Fixed by county commissioners.	Fixed by ter. board equalization.	Final assessed value.
		Fraction or other description.	Section.	Tnship.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.										
Atlantic and Pacific Railroad Co.																				
Section tools and miscellaneous property															315.99					
Office, station and telegraph furniture															1,689.00					
Personal property of the A. & P. R. R. Co.—John J. McCook, A. F. Walker and J. C. Wilson, receivers.																				
FIXED BY ASSESSOR.																				
Cross-ties, rails, fish-plates, spikes, culverts, bridges, depots, turntables, side tracks, buildings and entire superstructure on right of way, 93.7 miles, in Valencia county, at $6,500.00 per mile															609,050.00					
Land as per specified list						265,361.91	.30				53,072.38							79,608.57		690,663.56

TERRITORY OF N. M. VS. U. S. TRUST CO. OF N. Y. ET AL. 199

Exhibit No. 11 (Continued).

	Territorial tax.			County tax.																	
	Territorial purposes.	Territorial institutions.	Cattle indemnity.	School.	General.	Court fund.	Judgment fund.	Road and bridge fund.	Interest, '82 & '83.	Interest, 1885.	Interest, 1889.	Unpaid interest.	Interest on current exp-nse bonds.	Sinking fund.	Interest, 1895.	Total.	Amount due January 1st, 1896.	Amount due July 1st, 1896.	Penalty.	Total tax.
	4,143.96	1,388.62	.....	1,726.66	2,071.99	2,071.99	2,071.99	345.33	1,381.33	2,071.99	2,762.65	1,381.33	690.66	2,071.99	1,381.33	25,381.84	12,690.92	12,690.92		

Dollar, cent, and mill ($ c. m.) marks omitted.

343 TERRITORY OF NEW MEXICO, }
County of Valencia. }

Office of the board of county commissioners.

At a regular session held on the — day of ——, A. D. 1895—

It is ordered by the board of county commissioners of said county: That the preceding assessment-roll and each and every assessment therein contained as originally returned and assessed, or as shown thereon to have been revised and corrected by the board be and the same is hereby approved.

And that a tax of 2.35 of one per cent. for county purposes, and of two and one-half mills on the dollar for school purposes and of 3 mills on the dollar for court fund, and 8.25 mills for various territorial funds, to wit: For territorial purposes 6 mills on the dollar; for territorial institution funds 1.75 mills on the dollar; for cattle indemnity fund $\frac{50}{100}$ mills on the dollar of the appraised value of all cattle, is hereby levied upon all of the property therein returned assessed liable to taxation.

And it is further ordered that the county assessor extend the said several rates of taxes upon the tax-roll for the year 1895, and that upon the delivery of the tax-roll to the county collector the clerk of this board charge said collector with the aggregate amount of said several taxes as provided by law.

(Then follows warrant to collector to collect the tax.)

Signed 7th day of October, 1895, by Patrocino Luna, chairman of the board, Manuel P. y Chaves, commissioner.

Receipted for by Solomon Luna, collector, on Oct. 7th, 1895.

344 EXHIBIT No. 12.

Additional Assessment for the Year Eighteen Hundred and Ninety-five.

The following was omitted in the assessment of the year 1895, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile..... $214,500

Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which

was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile	$394,550
Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station	$2,289
Station-houses, depots, switches, water tanks, and all other improvements at San Jose station	541
Station-houses, depots, switches, water tanks, and all other improvements at El Rito station	842
Station-houses, depots, switches, water tanks, and all other improvements at Laguna station	4,025
Station-houses, depots, switches, water tanks, and all other improvements at Cubero station	700
Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station	1,045
Station-houses, depots, switches, water tanks, and all other improvements at Grant's station	3,150
Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station	4,757
	$17,349

Exhibit No. 12 (Continued).

Assessment-roll of Valencia County, Territory of New Mexico, for 1896.

Name of property-owner.	Prec'ct No.	Real estate.									Value of land.	Value of improvements.	Total value land and improvements.	Value of cattle.	Val. of per. property.	Deductions.	Fixed by assessor.	Fixed by county commissioners.	Fixed by ter. bd. equalization.	Final assessed value.
		Fraction or other description.	Section.	T'nship.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.										
Atlantic & Pacific Railroad Company											.. ..	626,399								

Exhibit No. 12 (Continued).

	Territorial tax.			County tax.																		Total tax.
	Territorial purposes.	Territorial institutions.	Cattle indemnity.	School.	General.	Court fund.	County additional.	Road and bridge fund.	Interest, 1882 and 1893.	Interest, 1885.	Interest, 1889.	Unpaid interest.	Interest on curr't ex. bonds.	Sinking fund.	Interest on bonds of 1885.	Judgment fund.	Amount due January 1st, 1897.	Amount due July 1st, 1897.	Penalty.	
	3,758.39	1,096.20	.....	1,566.00	1,879.20	1,879.20	.....	313.20	1,252.80	1,879.20	2,505.60	1,252.80	626.39	1,879.20	1,252.80	1,879.20	.....	.....	.....	23,020.18

Dollars, cents, and mill ($ c. m.) marks omitted.

EXHIBIT No. 13.

Assessment-roll of Valencia County, Territory of New Mexico, for 1896.

Name of property-owner.	Prec'ct No.	Real estate.									Value of land.	Value of improvements.	Total value land & improvements.	Value of cattle.	Val. of per. property.	Deductions.	Fixed by assessor.	Fixed by county commissioners.	Fixed by ter. board equalization.	Final assessed value.
		Fraction or other description.	Section.	Township.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.										
Atlantic and Pacific R. R. Co.																				
Station tools and miscellaneous property															315.99					
Office, station and telegraph furniture															1,689.00					2,004.99
Personal property of the Atlantic & Pacific R. R. Co.—C. W. Smith, receiver.																				
TAXED BY ASSESSOR.																				
Cross-ties, rails, fish-plates, spikes, culverts, bridges, depots, turntables, side tracks, buildings and entire superstructure on right of way, 93.7 miles, in Valencia county, at $6,500.00 per mile															609,050.00					609,050.00
Lands as per list attached to return						253,423.21	.30				76,026.96		76,026.96				126,711.60	76,026.96		76,026.96

Exhibit No. 13 (Continued).

	Territorial tax.			County tax.																
	Territorial purposes.	Territorial institutions.	Cattle indemnity.	School.	General.	Court fund.	Judgment fund.	Road and bridge fund.	Interest, '82 & '83.	Interest, 1885.	Interest, 1889.	Unpaid interest.	Interest on current exp-use bonds.	Sinking fund.	Interest, 1895.	Total.	Amount due January 1st, 1897.	Amount due July 1st, 1897.	Penalty.	Total tax.
	12.03	3.51	.....	5.01	6.01	8.02	12.03	1.00	4.01	2.00	8.02	4.01	2.00	6.01	4.01	77.67	38.84	38.84		
	3,654.30	1,065.84	.....	1,522.63	1,827.15	2,436.20	3,654.30	304.53	1,218.10	609.05	2,436.20	1,218.10	609.05	1,827.15	1,218.10	23,600.70	11,800.35	11,800.35		
	456.16	133.05	.....	190.07	228.08	304.11	456.16	38.01	152.05	76.03	304.11	152.05	76.03	228.08	152.05	2,946.64	1,473.02	1,473.02		

Dollar, cent, and mill (\$ c. m.) marks omitted.

350 EXHIBIT No. 13 (Continued).

Oath of Assessor.

I, Melquiades T. Otero, assessor of the county of Valencia, Territory of New Mexico, do solemnly swear that during the whole time allowed by law to make this assessment, I have made diligent inquiry and examination to ascertain all the property within said county subject to taxation, and that I have assessed it on the assessment book equally and uniformly to the best of my judgment, information and belief, at its full cash value, and that I have faithfully complied with all the duties imposed upon the assessor by the revenue laws of the Territory, and that I have not imposed any unjust assessment through malice or ill will, nor allowed any one to escape a just and equal assessment through favor or reward; so help me God.

(Signed) MELQUIADES T. OTERO, *Assessor.*

Sworn to and subscribed before me this twenty-second day of September, A. D. 1896.

RICHARD POHL,
Notary Public.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

Office of the board of county commissioners, Los Lunas, N. M.

At a regular session held on the 1st day of October, A. D. 1896. It is ordered by the board of county commissioners of said county that the preceding assessment-roll and each and every assessment therein contained as originally returned and assessed, or as shown thereon to have been revised and corrected by the board be and the same is hereby approved.

351 And that a tax of 2.45 of one per cent. for county purposes, and of two and one-half mills on the dollar for school purposes, and of 4 mills on the dollar for court fund, and 8.25 mills for various territorial funds, to wit: For territorial purposes, 6 mills on the dollar; for territorial institutions fund 1.75 mills on the dollar; for catt-e indemnity fund, $\frac{50}{100}$ mills on the dollar of the appraised value of all cattle, is hereby levied upon all property therein returned assessed liable to taxation.

And it is further ordered that the county assessor extend the several said rates of taxes upon the tax-roll for the year 1896, and that upon the delivery of the tax-roll to the county collector the clerk of this board charge the said collector with the aggregate amount of said taxes as provided by law.

To the collector of the county of ——, in said Territory, Greeting:

You are hereby commanded in accordance with the laws of said Territory in such cases made and provided, to collect all territorial, county, school, city and all other taxes above enumerated and speci-

fied levied on the citizens of said county and non-resident property-owners whose property may have been assessed in your county and all taxes assessed upon property within your county as appears from the tax-list of said county for the year 1896, being the foregoing tax-list and the delinquent tax-lists of said county for the previous years, and also that you collect all interest due on delinquent taxes as provided by the laws of said Territory.

In witness whereof we have hereunto set our hands and caused the seal of said board to be hereunto affixed and attested by
352 the clerk of said board this 1st day of October, 1896.

PATROCINO LUNA,
Chairman of Board.

[SEAL.] MANUEL S. SANCHEZ,
Commissioner.

Attest:
JACOBO CHAVES,
Probate Clerk and ex Officio Clerk of the Board of County Commissioners.

TERRITORY OF NEW MEXICO, }
County of Valencia. }

LOS LUNAS, N. M., A. D. 1896.

Received of Jacobo Chaves, probate clerk and *ex officio* clerk of the board of county commissioners of said county the tax-lists or assessment-roll of said county for the year 1896, which amounts to $90,533.14. * * *

Witness my hand this 1st day of October, A. D. 1896.

SOLOMON LUNA,
Collector in and for said County.

EXHIBIT No. 14.

Additional Assessment for the Year Eighteen Hundred and Ninety-six.

The following was omitted in the assessment of the year 1896, and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued, and assessed by the collector:

The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph lines, and other structures, erected upon the right of
353 way of the Atlantic and Pacific Railroad Company in the county of Valencia and constituting "improvements" upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile..... $214,500

Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph lines, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia and constituting "improvements" upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile..... $394,550

Station-houses, depots, switches, water tanks, and all other improvements at Rio Puerco station.....	$2,289
Station-houses, depots, switches, water tanks, and all other improvements at San Jose station.....	541
Station-houses, depots, switches, water tanks, and all other improvements at El Rito station.....	842
Station-houses, depots, switches, water tanks, and all other improvements at Laguna station.....	4,025
Station-houses, depots, switches, water tanks, and all other improvements at Cubero station.....	700
Station-houses, depots, switches, water tanks, and all other improvements at McCarty's station.....	1,045
Station-houses, depots, switches, water tanks, and all other improvements at Grant's station.....	3,150
Station-houses, depots, switches, water tanks, and all other improvements at Bluewater station.....	4,757
	$17,349

354

Exhibit No. 14 (Continued).

Assessment-roll of Valencia County, Territory of New Mexico, for 1896.

Name of property-owner.	Prec'ct No.	Real estate.									Value of land.	Value of improvements.	Total value land and improvements.	Value of cattle.	Val. of per. property.	Deductions.	Fixed by assessor.	Fixed by county commissioners.	Fixed by ter. bd. equalization.	Final assessed value.
		Fraction or other description.	Section.	T'nship.	Range.	No. acres.	Val. per acre.	Lots.	Block.	Name of town or city.										
Atlantic & Pacific Railroad Company												626,399								

Exhibit No. 14 (Continued).

Territorial tax.			County tax.																	
Territorial purposes.	Territorial institutions.	Cattle indemnity.	School.	General.	Court fund.	Judgment fund.	Road and bridge fund.	Interest, 1882 and 1891.	Interest, 1885.	Interest, 1889.	Unpaid interest.	Interest on current ex. bonds.	Sinking fund.	Interest, 1905.		Amount due January 1st, 1897.	Amount due July 1st, 1897.	Penalty.	Total tax.
3,758.39	1,096.20	.....	1,566.00	1,879.20	2,505.60	3,758.39	313.20	1,252.80	626.39	2,505.60	1,252.80	626.39	1,879.20	1,252.80	.....	.....	.....	.....	24,272.96

Dollars, cents, and mill ($ c. m.) marks omitted.

357 That afterwards, to wit, on the 5th day of October, 1899, there was filed in the office of the clerk of said court in said cause, an agreed statement of facts, which said statement is in words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

THE UNITED STATES TRUST COMPANY OF New York, Complainant,
vs.
THE ATLANTIC & PACIFIC RAILROAD COMPANY *et al.*, Defendants.
} In Equity. No. 1122.

Agreed Statement of Facts.

It is hereby stipulated and agreed by and between counsel for the Territory of New Mexico, intervening petitioner in this cause, and counsel for the late receiver, C. W. Smith, and the United States Trust Company of New York, that the following statement sets out facts which are fully agreed to and which may be considered by the court in passing upon the claims of the said intervening petitioner, if it shall deem it proper to do so, the said parties hereby not admitting, however, the materiality or relevancy of any of the said facts, and reserving the right to object to the consideration of any or all of them by the court, it being expressly stipulated between the parties that none of the facts herein admitted to be true shall be deemed an admission by either party, of the truth of such facts or any of them, save and except upon the hearing of this case upon the intervening petition of the Territory, and the issues joined thereon herein and for the purposes thereof.

358 The Atlantic & Pacific Railroad Company named in the intervening petition, was incorporated under the act of Congress, approved July 27th, 1866. That prior to March 12, 1872, the Atlantic & Pacific Railroad Company had definitely located its line of road through the county of Valencia, and on March 12, 1872, it filed in the office of the Secretary of the Interior of the United States a map showing its line of definite location through the Territory of New Mexico. That at the time said company definitely located its line of railroad under said act of Congress, through the county of Valencia, in said Territory, no survey of the lands in that county had ever been made by the Government, or by any one else. That the entire right of way of the said railroad company as located through that county (and at the time of the building of the railroad thereon) was located upon and over land which consisted of high, desert table-lands, hills and one or two small valleys. That no part of the right of way at the time when located and built upon passed over any cultivated, enclosed or occupied lands in Valencia county, save and except some small tracts cultivated by the Indians in the pueblos of Laguna and Acoma, within the limits of such

pueblos. That at the time of the location of said line, and the building of the railroad thereon, there was nothing, so far as the eye could see from any part of the right of way, to distinguish the land over which said line of right of way was located from any other wild, uncultivated, uninhabited and unsurveyed lands situated in said county, except where it passed across the two pueblos referred to and except also that somewhere on each of the grants hereinafter referred to there were persons living who
359 claimed owership to the exterior boundaries thereof. That in 1866 the Interior Department of the United States printed and published two maps, one of which purported to be a sketch map of the public surveys in New Mexico and Arizona, the other of which purported to be a map of the United States and Territories showing the extent of the public surveys, and other details, copies of which maps may be filed by either party, and upon filing may be considered by this court, or any appellate court for any purposes for which the same may be deemed material; that no other maps of the Territory of New Mexico were printed or published by said department until 1876. That in May, 1872, the Commissoner of the General Land Office sent a letterto the register and receiver of the United States land office, at Santa Fé, New Mexico, a copy of which is as follows:

DEPARMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May 8th*, 1872.

Register and receiver, Santa Fé, N. M.:

I transmit herewith a diagram showing the location of the Atlantic and Pacific railroad, through the Territory of New Mexico from the eastern to the western boundaries, showing also the forty and fifty mile limits of the land grant thereto, under act of July 27th, 1866, and you are hereby directed to withhold from pre-emption or homestead entry, private sale or location, all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, not reserved, sold, granted or otherwise appropriated and free from pre-emption, or other claims or rights, at the time the said road was designated by filing a plat thereof in this office, which was March 12th, 1872.
360 The even-numbered sections within the forty-mile limits you will increase in price to $2.50 per acre, and dispose of them at that ratability, and only under the pre-emption and homestead laws. The even sections outside of the forty-mile limits are not affected by this withdrawal, nor are claims of pre-emption settlers initiated prior to the right of the road attaching, March 12th, 1872, affected by it.

You will please acknowledge the receipt of this letter without delay.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

That upon receipt of said letter and in the month of May, 1872, the register and receiver of the United States land office at Santa Fé, New Mexico, made a withdrawal of lands in full accordance with such letter and that in such withdrawal there was not excepted therefrom any lands whatever, that a copy of the diagram enclosed in above letter is attached hereto as "Exhibit 1." That at the time of the location of said line of railroad by said railroad company through said county, and at the time of the building of its railroad thereon said railroad company had no actual knowledge that the line of said railroad as it was located through Valencia county was located upon lands other than lands belonging to the Government of the United States except in respect to the line through the lands cultivated by the Indians of the pueblos named; but at the time of the building of said road through Valencia county, it was a matter of general knowledge in New Mexico, that all of the lands embraced within some of the grants hereinafter mentioned were claimed under Spanish grants. That the railroad of the Atlantic and Pacific
361 Railroad Company through the county of Valencia was built and constructed by said railroad company on the line of definite location referred to through the county of Valencia in the years 1879 and 1880. That on February 23rd, 1881, the then Commissioner of the General Land Office of the United States wrote a letter to the Atlantic and Pacific Railroad Company, a copy of which is as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb.* 23*rd*, 1881.

E. F. Winslow, Esq., vice-president Atlantic and Pacific Railroad Company, Drexel building, cor. Wall and Broad streets, New York city.

SIR: I am in receipt of your letter of 15th inst. stating that your financial agents, Messrs. Seligman and Co., desire "an official statement of the number of acres to which the Atlantic and Pacific Railroad Company will be entitled upon completion of its road from the west boundary line of Missouri to San Francisco."

The grant was made by the act of July 27th, 1866. (14 Stats., p. 292.) The amount of land granted is twenty sections per mile on each side of the road where the same passes through Territories and ten sections per mile on each side where the line passes through States containing public lands; that is, forty sections per mile in the Territories and twenty sections per mile in the States. The grant is of the alternate odd-numbered sections. Had none of the lands in the granted limits been disposed of prior to the grant, it could be satisfied within lateral limits of twenty miles on each side in the States.

362 Where any of the lands in the "granted" limits, as above described, are otherwise disposed of, the act provides for "indemnity," to be taken from odd sections not more than ten miles beyond the "granted limits." There are thus reserved for the pur-

poses of the grant, and out of which it may be satisfied, the unappropriated odd-numbered sections within lateral limits of thirty miles on each side of the road in the States through which it runs and which embrace Government lands, and within fifty miles on each side in the Territories, to which the grant may be held to apply.

The grant is for a road from a point at or near Springfield, Missouri, to the Pacific, with a branch from the point at which it strikes the Canadian river to a point at or near Van Buren, Arkansas.

The main line as located, starting at Springfield, Missouri, runs to San Francisco, California, an approximate distance of 2,426 miles. The branch line, as located, runs from a point on the Canadian river, in the Indian Territory, to Van Buren, Arkansas, approximately 300 miles.

On the main line, from Springfield, the road is constructed to Vinita, in the Indian Territory, 89 miles being in the State of Missouri. At ten sections per mile on each side of the road the amount of the grant in Missouri is 1,139,200 acres approximately. The lands have been earned, and patents have issued for 504,385.15 acres. On this portion of the line there is but little land left subject to the grant, and the loss will have to be made up from the "indemnity" lands elsewhere.

From the west line of Missouri the main line enters the Indian Territory, and is located to the west line thereof, a distance of
363 about 355 miles. Of the branch line about 295 miles are also in this Territory. No withdrawal of lands for the benefit of the grant has ever been made in this Territory, nor could there have been any, since there have never been and are not now any local land offices established, and the lands have never in any manner, been subject to disposition under the general laws. Neither has there ever been any final decision of the question whether or not the lands in the Territory will pass under the terms of the grant to the company. Section two of the act making the grant provides for the right of way through the public lands; that the company may take from the adjacent public lands material for the construction of the road; prescribes the width for the right of way; exempts the right of way from taxation in the Territories, and said section closes as follows:

"The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act."

The grant of lands is contained in the following section of the act, section 3. The Indian title in this Territory has not been extinguished, and I will not here undertake to express any opinion in advance of a decision of the question concerning the status of the lands. If it shall finally be determined that the lands in question inure to the grant, the amount thereof in said Territory would be about 16,640,000 acres.

From the west line of the Indian Territory the main line
364 runs through the northern portion of Texas about 200 miles to the west line thereof. There are no Government lands in that State, and hence no grant of lands by the United States.

From the west line of Texas the main line, as located, runs through the Territory of New Mexico, about 416 miles, to the east line of Arizona Territory, and thence through Arizona, about 380 miles, to the west line thereof.

Through these Territories the amount of the grant is about 20,377,600 acres. The land is for the greater part unsurveyed, and I see no reason why, out of the lands reserved for the grants, the same may not be entirely satisfied as to this part of the line and yet have a very large quantity in the "indemnity" limits applicable to losses elsewhere.

From the west line of Arizona the located main line enters California, and runs to the coast at or near San Buenaventura, and thence, on a line more or less near the coast, to San Francisco, a distance of about 686 miles. Were the grant "full" in California, the amount would be about 8,780,800 acres.

This amount would be reduced to a considerable extent by the proximity of the line, in places, to the coast; but the deficiency may be satisfied by selections in "indemnity" limits anywhere along the line where indemnity can be found.

About five miles of the located branch line are in Arkansas. The amount of the grant for that portion would be about 64,000 acres, of which there would probably be available for the purposes of the grant about one-half in the "granted" limits.

Tabulated, were the grant full throughout, the figures would be as follows, estimated:

365 Location.	Miles.	Grant per mile.	Total grant.
Missouri main line	89	12,800	1,139,200
Indian Ty., main line	355	25,600	9,088,000
Texas (no grant)	200		
New Mexico Ty., main line	416	25,600	10,649,600
Arizona Ty., main line	380	25,600	9,728,000
California main line	686	12,800	8,780,800
Indian Ty., branch line	295	25,600	7,552,000
Arkansas, branch line	5	12,800	64,000
Total	2,426		47,001,600

From the amount of the grant, as above, there should be deducted, for deficiencies in area within the limits of the same, say 7,001,600 acres, leaving in round numbers the area of the grant 40,000,000 acres, of that amount there will be lost, by reason of valid interfering claims, reservations, etc., a very considerable portion, but to make good such losses there will remain the lands in the "indemnity" limits; that is, the lands in odd-numbered sections embraced

within the strip ten miles wide on each side of the "granted" limits for the whole distance to which, the grant extends, excepting that part of the land which lies so near the sea as to exclude the "indemnity" limits on the side next to the sea. Were the limits full along the entire line, on the basis of the above estimate the "indemnity" lands would aggregate more than 14,000,000 acres. Of course a portion of the "indemnity" lands would be excepted by prior claim from any operation of the grant; but in my opinion enough would remain to equal the losses in the "granted" lands.

I reiterate that this estimate is not to be taken as an expression of opinion that lands in the Indian Territory will inure to
366 the grant, but is subject to the decision of that question by competent authority.

Very respectfully,

J. A. WILLIAMSON,
Commissioner.

That the line of railroad referred to as located, built and constructed, passes going from the east to the west through a portion of the county of Bernalillo and across a portion of the county of Valencia, in New Mexico. That upon crossing the line between Bernalillo and Valencia county in going west, this railroad is located and built upon land claimed to belong to two Spanish grants, now known as the Joaquin Sedillo and the Antonio Guiterrez grants. That the grant papers pertaining to each of the above-named grants were a part of the archives of the government of Spain, received by the Government of the United States from Mexico and in the custody of the surveyor general of New Mexico ever since the organization of his office in 1855, but were never presented to the surveyor general of the Territory of New Mexico or filed or recorded in any public office in the Territory of New Mexico, except as aforestated prior to the 9th of September, 1896, when a petition was filed in the office of the clerk of the court of private land claims, at Santa Fé, New Mexico, by the claimants to the land of each grant separately against the United States, a copy of each petition is as follows:

In the Court of Private Land Claims, Sitting at Santa Fé, New Mexico.

J. FRANCISCO CHAVEZ
vs.
THE UNITED STATES.

To the honorable chief justice and associate justices of said court:

367 Your petitioner, J. Francisco Chavez, resident of the county of Valencia, in the Territory — New Mexico, brings this his petition, against the United States and thereupon shows to the court the following:

1. On the 5th day of Nov., 1716, Captain Antonio Gutierrez presented to Captain Felix Martinez, the then governor and captain general of New Mexico, his petition asking for a grant of a piece of

land below Isleta, apparently at a distance of two leagues, which formerly had been held by Christobal de Tapia, and setting forth that the boundaries of said land were on the north an arroyo de alamos, which comes down from the hills; on the south, the pueblo of San Clemente; on the east, the Rio del Norte, and on the west the hills of the Rio Puerco; and on the same day and year aforesaid, the said governor, in the name of the king made to the said petitioner the grant that he asked for as he described it, and as Christobal de Tapia formerly enjoyed it and directed Captain Beltazar Romero to place the said petitioner in possession. Copies of said petition and grant in triplicate, are filed herewith and marked "Exhibit A" the original thereof being in the office of the surveyor general of New Mexico as archive No. 315, being a part of the original Spanish archives in the custody of said office.

2. After the making of said grant as aforesaid, the said Antonio Gutierrez entered into possession of said land, and he and his lawful successors in title from that time down to the present have had continuous, peaceable and uninterrupted possession of the land embraced in said grant.

3. To the best of the knowledge, information and belief of
368 this petitioner, there are no persons in possession of, or claiming said tract of land, or any part thereof, adversely to the claim of this petitioner.

4. The said land is situate in the county of Valencia, in the Territory of New Mexico, and the boundaries thereof as are hereinbefore set forth, but it is expressly averred that the eastern boundary as hereinbefore set out refers to the old river bed of the Rio Grande del Norte, which at the northern portion of said grant is about two miles further east than the present bed of the river. It is impossible to state even approximately the quantity of land embraced in said grant, as no survey thereof has ever been made, but it is estimated to be between fifteen and twenty thousand acres, a map thereof showing the same as near as may be, being filed herewith.

5. No claim for the said grant has heretofore been confirmed, considered, or acted upon by Congress or the authorities of the United States, or heretofore been submitted to authorities constituted by the law for the adjustment of land titles within the limits of New Mexico.

6. This petitioner avers that the title to said grant was complete, and perfect at the date when the United States acquired sovereignty in New Mexico, and that this petitioner has succeeded in part to the rights of the original grantee, the said Antonio Gutierrez.

7. This petitioner further avers that to the best of his information and belief the arroyo del alamos which is hereinbefore mentioned as the northern boundary cannot now be identified probably owing to changes on the earth's surface, which have denuded the arroyo, if it still exists, of all trees, and which may have entirely obliter-
369 ated the arroyo itself; and that no tradition of its location has been preserved for the reason that this tract of land and one immediately north of it, which had been the property of Joaquin

Sedillo, had become united in the ownership of a single person as early as the year 1734.

Your petitioner therefore prays that the validity of the said title may be inquired into and decided by this honorable court, and that the same may be confirmed to the heirs and legal representatives of the said Antonio Gutierrez.

J. FRANCISCO CHAVEZ, *Petitioner*,
By F. W. CLANCY, *His Solicitor*.

THE UNITED STATES OF AMERICA:

In the Court of Private Land Claims, Sitting at Santa Fé, New Mexico.

J. FRANCISCO CHAVEZ
vs.
THE UNITED STATES.

To the honorable chief justice and associate justices of said court:

Your petitioner, J. Francisco Chavez, resident of the county of Valencia, in the Territory of New Mexico, brings this his petition against the United States, and thereupon shows to the court the following:

1. At some time in the early part of the eighteenth century a grant of land was made by the proper authorities of the government of Spain, to one Joaquin Sedillo, which land lies immediately south of the lands of the Indian pueblo of Isleta, and was bounded on
370 the north by the line of the league of said pueblo, on the east by the Rio Grande, on the south by a twin alamo called by some the Alamo de la Culebra, and on the west by the ceja of the Rio Puerco; but the original grant papers evidencing the said grant have been lost or destroyed and cannot now be produced. The fact of the existence of the said grant is, however, shown by papers which constitute a portion of archive 178, in the office of the surveyor general for New Mexico, copies and translations whereof are filed herewith in duplicate.

2. From the time of the making of said grant, the said Joaquin Sedillo, and his lawful successors in title have been in continuous, peaceable, and uninterrupted possession of the land embraced within the grant down to the present time.

3. To the best of the knowledge, information and belief of this petitioner, there are no persons in possession of, or claiming said tract of land, or any part thereof, adversely to the claim of this petitioner.

4. The said land is situated in the county of Valencia, in the Territory of New Mexico, and the boundaries thereof are as hereinbefore set forth; but it is expressly averred that the eastern boundary refers to the old river bed of the Rio Grande which is about two miles further east than the present bed of that river. It is impossible to state, even approximately, the quantity of land embraced in said grant, as no survey thereof has ever been made, but it is esti-

mated to be between ten thousand and fifteen thousand acres, a map thereof showing the same as near as may be being filed herewith. The southern boundary hereinbefore mentioned has, as petitioner is informed and believes, been completely destroyed, and its
371 location cannot now be identified with certainty, and it is probable that no tradition of its location now exists for the reason that the said tract of land and the one immediately south thereof had become united in ownership in the hands of one person as early as the year 1734, as will fully appear by reference to the said archive 178 hereinbefore mentioned.

5. No claim for the said grant has heretofore been confirmed, considered, or acted upon by Congress or the authorities of the United States, or been heretofore submitted to authorities constituted by law for the adjustment of land titles within the limits of New Mexico.

6. This petitioner avers that the title to said grant was complete and perfect at the date when the United States acquired sovereignty in New Nexico, and that this petitioner has succeeded in part to the rights of the original grantee, the said Joaquin Sedillo.

Your petitioner therefore prays that the validity of the said title may be enquired into and decided by this honorable court, and that the same may be confirmed to the heirs and legal representatives of the said Joaquin Sedillo.

J. FRANCISCO CHAVEZ, *Petitioner*,
By F. W. CLANCY, *His Solicitor*.

That the grant in the Antonio Gutierrez case as it appears in the Spanish archives, is as follows:

To the governor and captain general:

I, Captain Antonio Gutierrez, a resident of the town of Albuquerque and a native of this kingdom, appear before you in due
372 legal form, and I state that, being very much in need of lands on which to plant, in order to support my family, and also to the end that my sheep may have room to scatter out, and there being an uncultivated and unoccupied tract of lands below Ysleta, apparently at a distance of two leagues, which formerly was held by Cristobal de Tapia, of which tract will you be pleased to make me a grant in the name of his majesty, in the same manner as it was held by said Cristobal de Tapia, and if you be pleased to grant it to me, will you also order that the real possession be given me, designating to me boundaries and landmarks, in order that no prejudice may result to me in its possession?

Wherefore I ask and pray, with due humility, that you will be pleased to make me the grant that I ask for in the name of his majesty, as one who represents his royal person, and I swear in the name of God our Lord, and by the sign of the holy cross, that this my petition is not in bad faith, and whatsoever is necessary, etc.

ANTONIO GUTIERREZ. [SCROLL.]

NOTE.—I ask and pray that the boundaries belonging to said tract be designated to me—on the north an arroyo with some cottonwood

trees that comes down from the hills, on the south the pueblo of San Clemente, on the east the Del Norte river, and on the west the hills of the Puerco river; and I swear in due legal form that my petition is not in bad faith, and whatsoever is necessary, etc.

ANTONIO GUTIERREZ. [SCROLL.]

Presentation.

At the town of Santa Fé on the fifth day of the month of November, in the year one thousand seven hundred and six-
373 teen, before me, Captain Felix Martinez, governor and captain general of this kingdom and provinces of New Mexico and castellan of its forces and garrisons for his majesty, it was presented by the party therein named.

Decree and Grant.

And, it having been examined by me, I treated it as properly presented in accordance with law, and, in view of the fact that it is his majesty's will that his land should be settled and fortified, in his royal name I make to the petitioner the grant that he asks for, as he describes it and as Cristobal de Tapia formerly enjoyed it, without prejudice to a third party, who may have a better right, and I command Captain Baltazar Romero that as soon as he be notified with this my decree he shall place the petitioner in real possession; and this shall serve him as a sufficient formal title for his protection, and when these proceedings shall have been had he will transmit this grant and possession to my civil and military secretary in order that he make a certified copy thereof; and that this original petition remain in the said archives; and in witness thereof I signed it with my civil and military secretary.

FELIX MARTINEZ. [SCROLL.]

Before me,

MIGUEL TENORIO DE ALBA. [SCROLL.]
Civil and Military Secretary.

That the judgment of the court of private land claims in the two cases and its opinion accompanying the decision, are as follows:

In the Court of Private Land Claims, Sitting at Santa Fé, New Mexico.

374 J. FRANCISCO CHAVEZ and THE PUEBLO OF ISLETA *vs.* THE UNITED STATES. } No. 274.

J. FRANCISCO CHAVEZ and THE PUEBLO OF ISLETA *vs.* THE UNITED STATES. } No. 275.

These two cases having heretofore come on for hearing together upon the pleadings and exhibits on file and upon the proofs taken

in open court upon behalf of the petitioners, and counsel having been heard as well on behalf of defendants as on behalf of the petitioners, the court being now sufficiently advised in the premises, finds that the petitioners, and all of the material allegations of fact therein contained, have been sustained by satisfactory proofs and the court makes the following special findings of facts:

1. On November 5, 1716, the Spanish governor of New Mexico made to Antonio Gutierrez a grant of a tract of land described as bounded on the north by an arroyo with some cottonwood trees that comes down from the hills, on the south by the pueblo of San Clemente and on the east the Rio Del Norte, on the west the hills of the Puerco river, which boundary calls are well-known objects, except that on the north of the location of which there is no evidence.

2. At some time prior to the year 1734, a grant was made to Joaquin Sedillo, and he had also acquired and had in possession some additional land the whole being bounded on the north by the line of the league of the pueblo of Isleta, on the south by a twin alamo sometimes called the Alamo de la Culebra, which
375 boundary on the south was identical with the northern boundary of the above-mentioned grant to Antonio Gutierrez; on the east by the Rio Del Norte and on the west by the ceja of the Rio Puerco, these boundary calls being well-known objects except that on the south of the location of which there is no evidence.

3. In the year 1785, one Clemente Gutierrez died in possession of and owning the whole of the land of the said Antonio Gutierrez and Joaquin Sedillo, which was listed in the inventory of his estate made by his widow "as the rancho commonly called San Clemente, Barrancas, and Los Pinos."

4. At some time prior to the third of May, 1808, the pueblo of Isleta had acquired the title of Clemente Gutierrez to all of the said land lying on the west side of the present river bed of the Rio Grande del Norte, and had entered into possession of the same and has held such possession down to the present time, the extent of the said land so acquired by said pueblo being from the boundary of the grant of the pueblo to the boundary of the lands of Los Lentes.

5. By a number of different deeds from the children and heirs of Clemente Gutierrez beginning in the year 1819, Francisco Xavier Chavez acquired all of the Gutierrez title to so much of the said lands as lie to the east of the present river bed of the Rio Grande del Norte, which portion of said lands is known as the Bosque de los Pinos, the northern boundary thereof being the line of the grant to the pueblo of Isleta, and the southern boundary being the line of the lands of Los Lentes.

376 6. The northern boundary of the said lands of Los Lentes has been ascertained and fixed by this court in its decree of confirmation in the case of J. Francisco Chavez and Solomon Luna *vs.* The United States, which is number 64 on the docket of this court, as being the northern boundary of the land, the claim for which was confirmed in said decree.

7. After the making of the original grants the Rio Grande del Norte formed a new channel west of what was subsequently known

as the Bosque de los Pinos, leaving its former river bed at a considerable distance east of the new one, and that portion of the land in question lying between the old and new river beds has since been known as the Bosque de los Pinos and it is that which was occupied by Francisco Xavier Chavez.

8. The petitioner, J. Francisco Chavez, is a grandson of the said Francisco Xavier Chavez and has inherited his title to the Bosque de los Pinos which has been continuously in the possession of the said Francisco Xavier Chavez and his descendants since his purchase.

9. Clemente Gutierrez, and those deriving title under him *having* been in the possession of said land from some time prior to the distribution of his estate in 1785 down to the present time, at all times exercising dominion over it.

The court therefore finds, as matter of law, that the title held by Francisco Xavier Chavez and his descendants to that portion of the said lands lying between the old and present river beds of the Rio Grande del Norte, commonly known as the Bosque de los Pinos, and the title held by the pueblo of Isleta to that portion of the said lands
lying west of the present river bed of the Rio Grande del
377 Norte, were complete and perfect titles at the date when the United States acquired sovereignty over the country now embraced within the Territory of New Mexico, and within which said lands are situate; and that the said J. Francisco Chavez, and the said pueblo of Isleta are entitled to a decree of confirmation of their respective claims; and that, under the special circumstances of the case, but one decree of confirmation ought to be entered for the whole of the land lying between the grant to the pueblo of Isleta and the northern line of the grant to Ana de Sandoval y Manzanares, and that the said two cases are to be taken and considered as consolidated for the purpose of such confirmation and decree.

And it is declared by the court that the confirmation in this decree contained is made under title XII of Book IV of the *the* Recopilacion de Leyes de los Reynos de las Indias, the Spanish law of prescription and the law of nations.

It is therefore ordered, adjudged and decreed by the court that the claim for so much of the said land as lies between the old and present river beds of the Rio Grande del Norte, commonly known as the Bosque de los Pinos, be, and the same hereby is, confirmed to the said J. Francisco Chavez; and that so much of the said land as lies to the west of the present river bed of the Rio Grande del Norte be, and the same hereby is, confirmed to the said pueblo of Isleta; but this confirmation does not confer any right or title to any gold, silver, quicksilver mines or minerals of the same.

The court declares and specifies that the said land, the claims for
which are hereby confirmed, is situated in the county of
378 Valencia, in the Territory of New Mexico, and is bounded on the north by the southern line of the pueblo grant to the pueblo of Isleta, as surveyed under the confirmation of the same by the Congress of the United States; on the east by the old river bed of the Rio Grande del Norte; on the south by the north line of the

grant to Ana de Sandoval y Manzanares as established by the decree of this court in the case of J. Francisco Chavez and Solomon Luna *vs.* United States, No. 64, on the docket of this court; and on the west by the ceja (being the divide between the Rio Puerco and the Rio del Norte) of the Rio Puerco; and that the area of the said land is estimated to be between thirty and thirty-five thousand acres.

In the Court of Private Land Claims.

J. FRANCISCO CHAVEZ
vs.
THE UNITED STATES. } 274.

Opinion.

The questions presented for consideration in this case are first, as to the boundaries of the land granted; and, second, whether the plaintiff, J. Francisco Chavez or his copetitioner, the Pueblo of Isleta, is so connected with the title as to authorize this proceeding. The facts are as follows: On November 5, 1716, the Spanish government of New Mexico made to Captain Antonio Gutierrez a grant of a tract of land described as bounded "on the north by an arroyo with some cotton-wood trees that comes down from the hills; on the south by the pueblo of San Clemente; on the east, the Rio del Norte; on the west, the hills of the Puerco river." All these boundary calls
379 are well-known objects except that on the north, and of the location of the latter there is no evidence. In 1785, Clemente Gutierrez having died, in a proceeding to petition his estate, an inventory of his estate was made by his widow, who gave her name as Maria Apolonia Baca, and among other tracts of land listed was one described as "the rancho commonly called San Clemente, Barrancas, and Los Pinos." San Clemente was a well-known abandoned Indian pueblo. Barrancas was a well-known bluff on the Rio Grande river, which formed the south boundary of the pueblo grant to the Indians of the pueblo of Isleta. Los Pinos was a well-known grove of pines along the Rio Grande river, between the other named points. In the partition proceeding referred to this tract of land was distributed in individual parts among the widow and children of Clemente Gutierrez. On May 3rd, 1808, Lorenzo Gutierrez delivered to the pueblo of Isleta a statement to the effect that he was the administrator of the estate of his mother, Josefa Polonia Baca and that his predecessor, Mariano de la Pena, had conveyed to the Indians of the pueblo of Isleta the lands of his mother from the boundaries of the pueblo to that of Los Lentes, and that the deed was in the possession of the alcalde of the first district of Albuquerque.

Lorenzo Gutierrez was the son of Clemente Gutierrez and Mariano de la Pena was the husband of the daughter of Clemente Gutierrez. Los Lentes were a settlement having a tract of land the north boundary of which was a short distance north of the abandoned San Clemente pueblo. After the making of the grant to Antonio Gutier-

rez the Rio Grande formed a new channel west of the grove of
380 pines for the entire distance from the Barrancas to San Clemente and the tract lying between the old and new channels became known as Bosque de los Pinos. In the years 1819 and 1821 by different deeds, a number of the children and heirs of Clemente Gutierrez conveyed the Bosque de los Pinos to Francisco Xavier Chavez, giving the line of the pueblo grant as the north boundary and the line of Los Lentes as the south boundary. The plaintiff, J. Francisco Chavez, is a descendant and inherits from Francisco Xavier Chavez. In the year 1822 the alcalde of the district in a proceeding for that purpose, established the boundary line between the tract in question as the lands of the pueblo of Isleta and the lands of Los Lentes. In 1826 the pueblo of Isleta made complaint to the governor of the Territory against a man who had made an unauthorized settlement in the tract in which they asserted their ownership and that they had purchased the tract from "the house of Gutierrez." The Bosque de los Pinos has been in the possession of Francisco Xavier Chavez and his descendants since his purchase, and the pueblo of Isleta has been in possession of the remainder of the tract for a time beyond the memory of man. From these circumstances we think it is a fair inference that Clemente Gutierrez was the descendant and heir of Antonio Gutierrez. There is no reason to say that he was not. It is more probable that he inherited the title from Antonio Gutierrez than that he was a stranger to the title. Clemente Gutierrez and those deriving title under him were in possession of the land from a time of years prior to the distribution of the estate in 1785 and have continued in that possession from that time to the present, at all times
381 exercising dominion over it, claiming ownership under the inheritance from Clemente Gutierrez. Under Spanish and Mexican law as we think this was sufficient to establish ownership. By law 1, Book 4, title 15 of the Recopilacion it was provided that a title by prescription could be acquired as against the Crown of cities, towns, and villages, etc., by a possession of forty years. (See New Orleans *vs.* United States, 10 Peters, 724.) The Recopilacion and the Partidas were the fundamental laws of Spain (10 Peters, 724). By laws 9, 14, and 15, title 29, partida 3, it was provided that an inheritance was such a "just title" as was requisite to become the basis of title by prescription. By law 14, title 12, Book 4, of the Recopilacion (2 White, 52) the right to acquire title by prescription against the Crown was recognized as applicable to public lands. The provisions and principles of this law were recognized and continued in force as to public lands by the 2nd article of the royal cedula of 1754. The fundamental principles of Spanish law as found in the Recopilacion and in the Partidas were not set aside by the independence of Mexico, but continued to be regarded and respected as the law of that country after independence. From a book entitled Collections of the Laws and Decrees of the Cortes of Spain, reputed to be in force in the Republic of the United States of Mexico (Mexico, 1829, press of Galvan) we quote:

"The independence of Mexico being fortunately realized by the

occupation of its capital on the 27th of Sept. 1821, and the destruction of the vice-royal government, although the bonds of dependence with Spain were broken forever, the laws that regulated
382 the duties and rights of those who composed this new society could not and ought not remain without force for not being possible to renew them except after the lapse of time and by competent authorities, the sudden abolishment of all of them would be the same as the establishment of absolute anarchy when order was most needed. Thus it is that, with exception of those laws that conflict directly with the memorable plan of Iguala and the new order of things it created, all others that have emanated from the King of Spain and from the sovereign authority recognized until that day, were observed and respected, lawsuits were decided by them, justice was administered under them, and Mexicans adjusted their social life to their tenor. From this it resulted that the Spanish codes, which it has not yet been possible to substitute by other new ones, are eagerly sought for by the judges, professors, and even by plain citizens, inasmuch as they find in them the guide for their actions, the guarantee for their reciprocal rights, and the rule for their procedure."

We think, therefore, that forty years' possession, proceeding upon a title by inheritance is sufficient evidence of a perfect title to the whole tract so possessed as against both Spain and Mexico, and sufficient to show a connection of such possession with the original grant.

In the recent case of The United States *vs.* Chavez, 159 U. S., 451, it is said, "We do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case. Without going that length into the subject it may be safely said that by the weight of authority, as well as by preponderance
383 of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse and uninterrupted possession for twenty years, and that such rule will be applied as *presumptio juris et de jure* wherever by possibility a right may be acquired in any manner known to the law. 1 Greenleaf Ev., 12th ed., sec. 17; Richard *vs.* Williams, 7 Wheat., 59, 109; Coolidge *vs.* Larned, 8 Pick., 503. Nothing, it is true, can be claimed by prescription which owes its origin to and can only be had by, matter of record; but lapse of time accompanied by acts done, or other circumstances, may warrant the jury in presuming a grant or title by record. Thus, also, though lapse of time does not of itself furnish a conclusive bar to the title of the sovereign, agreeable to the maxim *nullum tempus occurrit regi;* yet if the adverse claim could have had a legal commencement juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly royal grants have been thus found by the jury after an indefinitely long-continued peaceful enjoyment, accompanied by the usual acts of ownership. 1 Greenl. Ev., sec. 45. The principle on which this doctrine rests is one of Roman law and the codes founded thereon. Best's Principles of Evi-

dence, sec. 366, and was therefore a feature of the Mexican law at the time of the cession."

We are justified in supposing that this language was intended for our guidance, and we think it is applicable to the facts of this case.

On the whole case, we think the evidence is sufficient to show a title such as is entitled to be confirmed as a perfect title.

384 There will be a confirmation of the tract known as Bosque de los Pinos to J. Francisco Chavez, and the tract claimed by the pueblo of Isleta will be confirmed to the pueblo of Isleta.

The decree should definitely describe the boundaries of each tract, the north boundary being at the south line of the pueblo grant to the pueblo of Isleta as surveyed under the confirmation of the same by Congress.

(Signed) HENRY C. SLUSS,
Associate Justice.

That the United States has appealed from the judgment rendered in each of said cases, and the appeals are now pending in the Supreme Court of the United States.

That the right of way going west crosses these two grants in a southwesterly direction, crossing the north and south line of each. That the length of the right of way over these two grants is about 4 miles. That prior to the filing of the petition in the court of private land claims, as stated, no one, including even the owners of the grants, knew of their existence, except that in the trial of the San Clemente case in the court of private land claims, the Government found and produced, in that case the archives tending to show these two grants. That prior to the decision of the court of private land claims in this case, no one could have determined where the north and south line of said grants, or either of them, was located, or the width of them, or either of them north and south, except that the north line was the south line of the previously surveyed and patented Isleta Pueblo grant and the south line was the north line of the San Clemente grant as confirmed by

385 the court of private land claims. That prior to the decision referred to there never was any segregation of the land contained in these two grants from the public lands of the United States, or from the lands of any one else except as may appear from facts stated herein. That prior to the filing of the petition in each of these cases in the court of private land claims, no officer, agent or servant of the Atlantic & Pacific Railroad Company, or of C. W. Smith, late receiver or of the United States Trust Company of New York had any actual or constructive knowledge of the existence of either of these two grants, except as may be shown by the facts herein set forth. That upon crossing these grants, said right of way is over a portion of a Spanish grant, known as the "San Clemente" grant, for a distance of about 10.5 miles.

That the right of way crosses the north, south and west lines of said grant. A copy of the San Clemente grant which was filed in the office of the surveyor general of New Mexico May 30, 1855, is as follows:

Translation of Title Papers.

Grant of the tract of San Clemente, made to Ana de Sandoval y Manzanares.

To the governor and captain general:

I, Ana de Sandoval y Manzanares, a resident of this province of New Mexico, placed at the feet of Your Excellency, appear in due legal form, and state, sir, that when the Marquis de la Nava de Brasinas, who may God have in glory, who was governor and captain general of this said province, brought us hither in the year ninety-two for its settlement; in the view of which, and in the name of my lord the King, God preserve him, promised to give to each
386 one of the native citizens of this province, who might come to settle and pacify the same, the tracts of land and fields, and stock-raising ranches, that we abandoned in the year eighty on account of the powerful insurrection. By virtue of having been restored to said province, suffering thereby a great many hardships and finding myself really poor, and a widow of Blas de la Candalaria, deceased, and burdened with children, a good reason to supplicate Your Excellency, that you grant me, in the name of His Majesty, whom may God preserve, a tract of land called San Clemente, which I inherited from my father, deceased, Mateo de Sandoval y Manzanares, who left me the grant of said rancho, with its boundaries as follows: On the northern part with the lands of Cristobal de Tapia and on the southern part with the lands and walls of the house of Tomo Domingues; on the eastern part with the Del Norte river; on the part of the west with the Rio Puerco; which I ask of Your Excellency, and pray with the profoundest respect that you may send the person whom it may be your pleasure, that the same may place me in the royal possession of said tract, together with the new grant, that I, my children, grandchildren, and heirs, and successors, may use and enjoy the same freely; and I declare in due form whatever may be necessary.

ANA DE SANDOVAL Y MANZANARES.

Presentation.

In the city of Santa Fé, on the thirteenth day of the month of July, in the year seventeen hundred and sixteen, before me, Don Felix Martines, captain for life of this royal garrison of the city of Santa Fé, governor and captain general of this province,
387 and castellan of its forces and garrison for His Majesty, the petition was presented by the petitioner. I treated the same as before me in due legal form, and in view of the justness of her petition and said lands belonging to her father, according to her petition, and the same having been abandoned by him on account of the insurrection of the year eighty.

Decree.

I concede to her the grant she asks, in the name of His Majesty, to the aforesaid, her children, heirs and successors, that she may enjoy and hold the same; provided that it be without injury to any third party, who may have a better right; and she must settle the said grant within six months on account of the many occupations of the time, and I hereby command Captain Antonio Gutierrez to place her in royal possession in the name of His Majesty in all due form legal, and that this decree shall be for her a sufficient title; and as soon as said possession is given her that this original may be returned to this office, that duplicate may be made, and that it may so appear, I have signed this with my secretary of government and war on said day as above.

PHELIX MARTINES.

Before me—

MIGUEL TENORIO DE ALVA,
Secretary of Government and War.

In this city of San Felipe de Albuquerque on the twenty-third day of the month of July, seventeen hundred and sixteen, I, Captain Antonio Gutierrez chief alcalde and war captain of the said city and its jurisdiction, in compliance to the decree above named, by his excellency, the governor and captain general, Don Phelix
388 Martines, I went to the said tract and lands that in said decree I was commanded, and there I gave royal possession in the name of His Majesty, whom may God preserve, to Felix de la Candelaria, in the name of his mother, Ana de Manzanares y Sandoval, in legal form with the accustomed ceremonies that the law prescribes, leading him by the hand and he tore up grass, threw stones and shouted, and I now give said possession with the boundaries that are designated in her petition, and therefore the same are its boundaries: on the east by the Rio del Norte, on the west by the Rio Puerco, on the south by the house of Tome Domingues, and on the north by a ruin that is a little above the pueblo of San Clemente; and in the said boundaries I ordered mounds to be made, having first examined them, and I signed it with two attending witnesses; and that it may so appear I have signed, I, the said chief alcalde and war captain with two attending witnesses, on the said day, month, and year, as above.

Before me a special justice.

ANTONIO GUTIERRES.

Attending witness:
ANTONIO DE CHABES.

Attending witness:
BALTAZAR ROMERO.

That on November 18, 1871, the surveyor general of the Territory of New Mexico, approved said claim, and on December 18, 1872, transmitted the same with his approval to the Commissioner of the

General Land Office. That in 1873, the report of the surveyor general was transmitted to Congress by the Secretary of the Interior; that in April and May, 1878, a preliminary survey was made
389 under the direction of the surveyor general; that on November 5, 1886, the then surveyor general of the Territory of New Mexico decided that while the Spanish grant papers were genuine, yet the claim should be rejected for other reasons and so reported to the Commissioner of the General Land Office, and his report was transmitted to Congress. That no action was ever taken by Congress. That afterwards the claimants to said grant presented a petition to the court of private land claims at Santa Fé, New Mexico, to have the grant confirmed against the United States, and that on September 4, 1896, a decree was entered by said court confirming said grant, a copy of which decree is as follows:

In the Court of Private Land Claims, Sitting in the Territory of New Mexico.

J. Francisco Chaves and Solomon Luna
vs.
United States. } No. 64.

This cause having heretofore come on for hearing upon the pleadings and exhibits on file, and upon proofs taken in open court, as well on behalf of defendants, as on behalf of petitioners, full legal proof having been taken and counsel having been heard for said parties, and the petition herein having been sustained by satisfactory proofs, the court, being now sufficiently advised in the premises, makes the following findings of fact:

1. That on the thirteenth day of July, in the year 1716, Ana de Sandoval y Manzanares, the widow of Blas de la Candelaria, presented to the then governor and captain general of New Mex-
390 ico, Don Felix Martinez, her petition praying that he grant her a piece of land called San Clemente, and setting forth the boundaries of said land, as being, on the north the lands of Cristobal de Tapia, on the south the lands and walls of the house of Tome Dominguez, on the east the Rio del Norte, and on the west the Rio Puerco; that thereupon the said governor and captain general made to her the grant which she asked, and commanded the Captain Antonio Gutierrez to place her in possession with all the ceremonies of law; and that on the 23rd day of July, 1716, the said Captain Antonio Gutierrez, in pursuance of the command aforesaid of the governor, delivered possession of said land, to Felix de la Candelaria as the representative of his mother, the said Ana de Sandoval y Manzanares, with the boundaries designated in her said petition, specifying the same to be, on the east the Rio del Norte, on the west the Rio Puerco, on the south, the house of Tome Dominguez, and on the north, a ruin which is a little above the pueblo of San Clemente.

2. That the Rio del Norte which constitutes the eastern boundary of said land, did not, at the time of the making of said grant, run

in the same channel where it now does, but at some distance to the eastward of its present bed, and that the old river bed is the eastern boundary of said land, a portion or portions thereof lying east of the present river,

3. That the land included in said grant has been in the possession of said grantee, her heirs and legal representatives, continuously from the year 1716 down to the present time, and that at least one of the petitioners in this cause, Solomon Luna, has succeeded in part to the rights of said original grantee, by in-
391 heritance from an ancestor Domingo de Luna, who purchased portions of said land from heirs of the original grantee, prior to the *the* year 1750.

The court finds as matter of law, that by reason of the facts hereinbefore set forth a title to all of the land included within the boundaries aforesaid was vested in the said Ana de Sandoval y Manzanares, which title was complete and perfect at the date when the United States acquired sovereignty over the country now embraced within the Territory of New Mexico, within which said grant is situate, and that the petitioners herein are entitled to have the same confirmed to the heirs and legal representatives of the said Ana de Sandoval y Manzanares.

The court hereby specifies that the said land is located within the county of Valencia, in the Territory of New Mexico; that it is bounded on the north by an east and west line running through the point where the public road from Los Lentes to Ysleta crosses a lateral irrigating ditch running in an easterly direction from the main ditch or Acequia Madre, which lies to the west of said road, which point is about three-quarters of a mile north of the chapel or church at Los Lentes, and a short distance above a road which branches off from said first-mentioned road, and runs in a westerly direction toward the hills; on the east by the old river bed of the Rio Grande del Norte; on the south by the northern boundary line of the Nicolas Duran de Chaves grant as heretofore fixed by a decree of this court, and as shown by the survey of said grant made in pursuance of said decree and approved by this court on the 29th day of May, A. D. 1895, and on the west by the Rio Puerco; and that the estimated area of said land is about thirty-seven thousand acres.

392 It is therefore ordered, adjudged and decreed by the court that the claim for the land embraced within said grant as hereinbefore described and specified, be, and the same hereby is, confirmed to the heirs and legal representatives of Ana de Sandoval y Manzanares, but this confirmation does not confer any right or title to any gold, silver or quicksilver mines or minerals of the same.

It is declared by the court that the confirmation in this decree contained is made under title XII, of Book IV, of the Recopilacion de Leyes de los Reynos de las Indias, the royal decree of the King of Spain of October 15, 1754, and the law of nations.

September 4, 1896.

HENRY C. SLUSS,
Associate Justice.

That prior to the survey made under the decision of the court of private land claims in this cause, no one could have determined, actually, where the line of railroad entered into or passed out of this grant, or how much mileage there was over lands belonging to this grant. That while some portions of this grant were occupied by the owners of interests in it, yet none of the portions covered by the right of way of said railroad company were occupied, or cultivated, and the owners claimed the north line to embrace lands contained in the two grants above stated, and the survey of 1878 was in accordance with that claim. That at the time of the location of the right of way of the said railroad company over the lands contained in this grant, the walls and house of Tome Dominguez were not in existence and the line between said grant and the lands that were owned by Christobal de Tapia prior to 1716 was undetermined,
393 with nothing to mark its existence on the ground or elsewhere.

That none of the officers, agents or servants of the Atlantic & Pacific Railroad Company or of C. W. Smith, late receiver, or of the United States Trust Company of New York, ever had any actual knowledge of the actual existence of this grant prior to the year 1878, when survey was made as aforesaid, except as such knowledge may be constructively imputed from the fact that people were living thereon in the valley of the Rio Grande, and claiming title to the exterior limits of the grant. That prior to the decision of the court of private land claims in this case, it would not have been possible for any one to have actually determined how many miles of right of way of the railroad company was located upon lands covered by this grant, or where the said right of way crossed the exterior lines of this grant, but, subsequent to the location of the said line of railroad on March 12, 1872, and prior to the construction of the said railroad, all parties interested had notice that all of the land traversed by the railroad through these three grants, and as well the land traversed by the railroad in the Nicolas Duran de Chaves grant, in the Antonio Sedillo grant and in the Laguna Pueblo grant was claimed to be private property under alleged Spanish grants.

That the right of way crosses from the San Clemente grant into another Spanish grant known as the Nicolas Duran de Chaves grant, crossing the north line of the last-named grant a little ways, and recrossing again into the San Clemente grant; that said right of way is located upon the last-named grant, as it is now established, about
2¼ miles, the point of entrance in said last-named grant being
394 about twelve miles west from the Rio Grande valley; that the history of the last-named grant is as follows:

That on April 11, 1887, there was presented to the then surveyor general of New Mexico, a petition, of which the following is a copy:

SANTA FÉ, NEW MEXICO, *April* 11, 1887.

Hon. George W. Julian, surveyor general of New Mexico.

SIR: In behalf of the legal representatives of Nicolas de Chaves, also known as Nicolas Duran de Chavez, it is respectfully set forth:

In 1739 Nicholas de Chavez, also known as Nicholas Duran de Chaves, a resident of the town of Atrisco of the jurisdiction of the

town of Albuquerque, made a petition to Governor and Captain General Gaspar Domingo de Mendoza of the Territory of New Mexico, setting forth that in the preceding year of 1738 he had made a petition in writing to his predecessor General Enrique de Olavide y Michelena, asking for a tract of unoccupied and uncultivated land lying along the Rio Grande; that the said General Olavide y Michelena had directed him to hold the land in the best way he could until his successor, General Mendoza, should occupy the governorship; that he therefore renewed his petition that the said tract of land, the boundaries of which he described, be granted to him.

On June 1, 1739, Captain General Mendoza approved the said petition and directed Juan Gonzales Bas, alcalde mayor of Albuquerque, to put Don Nicholas de Chavez in possession of the lands which he asked for, wi-h designation of their boundaries.

On August 26, 1739, the said alcalde mayor, after due no-
395 tice to the residents of the neighborhood, formally put the said Nicholas de Chavez in judicial possession of the said lands, designating the boundaries of the same.

On September 30, 1739, Captain General Mendoza made a marginal note on the original grant papers to the effect that the royal title or grant to the said lands had been entered in the "Government Book" (Libro Gobierno) kept in the archives of Santa Fé.

On October 6, 1743, Captain General Mendoza reaffirmed the grant with its boundaries as originally made.

On June 2, 1749, Bernardo Antonio Bustamente Tagle, lieutenant civil and military governor of New Mexico, on petition of the residents of the community of Belen, took action to fix the boundary between the said lands granted to Nicholas de Chavez and those of the said community. Unfortunately one-quarter page upon which this document is written is missing, and it is impossible to gather from the fragment which remains what decision was made by this official.

For further and more definite information and particulars reference is made to the original papers herewith transmitted together with a transcript and a translation of the same, marked respectively "A," "B" and "C."

The amount of land claimed is not known, as no survey has ever been made of the grant. The land is non-mineral and is situated on the Rio Grande in Valencia county, New Mexico, and it is thought that there may be a conflict with the claim known as the Ana de Sandoval y Manzanares.

The most of the lands embraced within the limits of the
396 said grant have been surveyed by the Government of the United States, and they appear as public lands open to settlement, on the official plats of the survey of said lands. The claimants therefore request that you will take the proper action, as required by section 8, of the act of Congress approved July 22, 1854, to withdraw such lands until final action be taken by Congress in the matter. To that end claimants here set forth a list of sections, or parts thereof, of the said lands which have been so surveyed, viz:

Such parts of sections 1 and 12 of township 5 N., of range 1 W., as lie east of the Puerco river.

Such parts of sections 9, 10, 15, 23, 25, 26 and 36, as lie east of the Puerco river, and sections 14 and 24 of township 6 N., range 1 W.

Sections 1 to 6 inclusive, and such parts of sections 7 to 12 inclusive, as have been surveyed and platted as public land, of township 5 N., range 1 E.

Such parts of sections 19 to 24 inclusive as have been surveyed and platted as public lands, and sections 25 to 36 inclusive of township 6 N., range 1 E.

Sections 5 and 6, and such parts of sections 4, 7 and 8, as have been surveyed and platted as public land, of township 5 N., range 2 E.

Sections 19, 20, 29, 30, 31 and 32, and such parts of sections 21, 28 and 33, as have been surveyed and platted as public land, of township 6 N., range 2 E.

The names of the present claimants are:

Jose Chavez y Gallegos; Felix Chavez; Perfecto Chaves y Chaves; Juan Jose Chaves; Jose Sanches Sedillo; Manuel Sanches y Chaves; Juan Antonio Chaves; Juan Christobal Chaves; Maria
397 Chaves; Francisco X. Vigil; Jose Prudencia y Chaves; Petrocino Gabaldon; Manuel Sanches y Chaves; Agapito Garcia; Francisco Chaves y Armijo; Jose Sanchez y Sedillo; Jose Rafael Sanchez y Chavez; Jose Chavez y Gallegos; Juan Christobal Chaves; Ateran Sanchez y Padilla, all of whom are now residing upon the tract of land claimed, and who claim to be entitled by inheritance as descendants of the original grantee, Nicholas de Chaves.

These claimants believe that there are other persons entitled to interests in said grant as the descendants of said grantee, or as purchasers from such descendants, and they therefore ask that their claim for said land be recommended by you in favor of the legal representatives of such grantee Nicholas de Chavez, so that none of such owners may be in any way prejudiced by the action of the government.

Very respectfully,

CATRON, THORNTON & CLANCY,
Attorneys for Claimants.

That there *was* presented to the surveyor general at said time in said petition, the grant papers, following:

Leaves.

Senor governor and captain general:

I Don Nicholas Duran y Chaves, a resident of the place of Atrisco, jurisdiction of the town of Albuquerque, appear before Your Excellency asking that I may have the benefit of all the privileges allowed me by law and which may be pertinent to my purpose, and availing myself of the royal patronage which is vested in you, I state that the year last past of seventeen hundred and thirty-eight, on

account of the Senor General Don Henrique de Olavide y
398 Michelena, Your Excellency's predecessor, having passed through the said town of Albuquerque on his general visit of inspection, I went to His Excellency on the day that he stopped there, petitioning in writing that he should make me a grant in the name of His Majesty of an uncultivated and uninhabited tract which is upon the banks of the Del Norte river as I have some large and small stock without having a reasonable place to keep them except with injury to my neighbors and the pueblo of Isleta. (In reply) to which petition said senor general ordered me to remain on said tract in the best way I could until Your Excellency should enter into possession of the governorship for which reason I suspended my request and reserved it for this occasion in these terms, and as one of the original settlers of this kingdom, also on account of being burdened with a family with nine male children of some age, and what is more, not having any place to put my stock (I am) exposed to total ruin and loss.

Will Your Excellency be pleased as a justice and favor to make me in the name of His Majesty (whom may God preserve) a grant of said tract bordering on the Del Norte river, the boundaries of which on the east side look upon said river; upon that of the west the Rio Puerco river; upon that of the north the lands of Captain Bernabe Baca; and upon that of the south it fronts upon the ponds (esteros) which are called San Pablo's; and on account of it being uncultivated and without any owner of it ever having been known from time immemorial up to the present I examined it and entered thereon at the imminent danger of my life; I fitted up a hut, I put
my stock upon it, and I have maintained myself there up to
399 the present time with great labor and risk from the savages (infieles), and if Your Excellency deign to make me a grant of said tract will you (su gratitud) also be pleased to order that the chief alcalde of the jurisdiction of Albuquerque shall put me in possession of it under the formalities prescribed by law.

Wherefore, I request Your Excellency to be pleased to do and determine as I have asked, in which I expect to receive benefit and favor with justice, etc.

DON NICHOLAS DE CHAVES. [SCROLL.]

At the town of Santa Fé on the first of June of the year one thousand seven hundred and thirty-nine, I, Don Gaspar Domingo de Mendoza, governor and captain general of this kingdom of New Mexico for His Majesty, this having been examined, treated it as presented and in view of that which is contained in this writing which Don Nicholas de Chaves sets forth, I make to him grant in the name of His Majesty of the tract of land which he asks for, for him, his children, heirs and successors who may have the better right, in virtue of representing to me that it is without injury to a third party with the conditions and provisions that he is to keep them as His Majesty commands in his royal orders, and in virtue of this grant the chief alcalde of the town of Albuquerque, Juan Gonzales Bas, will place the said Don Nicholas de Chaves in pos-

session of the lands mentioned, which he asks for, designating to him their boundaries; thus I decreed, commanded and signed with attending witnesses, acting by special authority for lack of a royal or public notary of which there is none in this kingdom.

Don GASPAR DOMINGO DE MENDOZA. [SCROLL.]

Witness:

400 *DIEGO DE UGARTE.* [SCROLL.]

Witness:

JOSEPH TERRUS. [SCROLL.]

At this place of the San Pablo ponds (los esteros de San Pablo) jurisdiction of the town of San Felipe de Albuquerque, on the 26th day of the month of August in the year one thousand seven hundred and thirty-nine, I Captain Juan Gonzales Bas, chief alcalde and war captain of said town, and its jurisdiction in virtue of the decree enacted by the senor governor and Captain General Don Gaspar Domingo de Mendoza, pronounced the first day of June last past of said year, in which he commands me to go and give royal possession to Don Nicholas de Chaves of that which according to the tenor of his petition is granted to him in the name of His Majesty, which decree was made known by my direction to the residents and adjoining owners to said lands concerning which finding only slight controversy on account of it not being known by me, or by those present, which was the house of Tome Dominguez, which boundary said Nicholas Chaves mentioned in that which he asks for on the (illegible) side, and not being certain which was the house or walls which said Nicholas de Chaves asked for as a line or boundary and Captain Bernabe Baca alleging and saying that possession was given to him at a house and walls which is that which he has for boundaries of the lands that he possesses, and each one alleging that he has the right of property to said boundary, one because possession was given him therein, and the other asking as far as said house as a boundary, and there being a controversy between the two on account of there being two houses without any title
401 whatever, within the distance of a league and each one above and below wishing to appropriate it as his own, and the controversy being thus, I said chief alcalde on account of the doubt and not being certain which of the two houses really is the one that belonged to Tome Dominguez, and by agreement of the two contestants it was decided to give the possession by the lands joining each other at a point half way between the two houses; wherefore a little round pond (esterito redondo) with some water and grown up with rushes was designated to him as a boundary and division of tracts. This serves as a boundary to said Bernabe Baca on the south side, and to said Nicholas de Chaves it serves as a boundary on the north side; and not finding any other controversy than that to which I have referred, in view of that which is commanded I proceeded to give the possession; and having traveled about four leagues, a little more or less, we arrived at the boundary of the said place (p-torn-esto) of the San Pablo ponds (los esteros de San Pablo)

where in the presence of attending and instrumental witnesses, as required by law, I gave my hand to the said Nicholas Chaves, I conveyed him over his lands, he called aloud, pulled up grass, threw stones and (complied with) the other necessary conditions which in similar cases are required and (torn, see note 1, following translator's certificate) he received the royal possession in the name of *His Majesty quietly and peaceably, granting to him the same boundaries* which he asks for in his first petition, which are the following: On the east side the Del Norte river; on that of the south the
San Pablo ponds (los esteros de San Pablo); on the west with
402 the Puerco river; and on the north by the one I have referred to as between the two houses which is the little pond (esterito) grown up with rushes on which (boundaries) I ordered mounds to be placed to perpetuate their memory and it was given free and general with pastures (rest of line missing) watering places, woods and uses and customs (rest of line missing) them he may enjoy for himself, his children, heirs and (part of word) (remainder of line missing) (part of word) whatever and this royal possession (remainder of line missing) (part of word) title in order that it he may enjoy with (rest of line missing) and in order that it may appear it I placed as (part of word—rest of line missing) (part of word) witnesses instrumental Francisco (part of name—rest of line missing).

(Part or name) Baca and those of my attendants who signed it with me, I acting as special justice on the present common paper because the stamped paper is not in circulation in these parts on said day *ut supra.*

Before me as special justice.

JUAN GONZALES BAS. [SCROLL.]

Witness-:

SALVADOR MARTINES. [SCROLL.]

ISIDRO SANCHES. [SCROLL.]

(*Marginal Note.*)

SANTA FÉ, *September* 30, 1739.

This royal title is noted in the government book which is kept in the archive of this capital in order that it may appear of record when needed.

MENDOZA. [SCROLL.]

(End of marginal note.)

SANTA FÉ, *October* 6, 1743.

403 In this grant the boundaries are to be recognized as those therein mentioned, and they are the same which should be recognized by said grant and its owner, who is Don Nicholas de Chaves, it being understood that in this as well as the other grants, the pastures, entrances and exits (pasos) and water holes are common with the exception of cultivated lands, corrals and the rest that may be to the grave injury of the owner and I signed it in order that it be observed.

GASPAR DOMINGO DE MENDOZA. [SCROLL.]

(torn) this tract of Our Lady of Guadalupe on the second day (torn) month of June of the year one thousand seven hundred and forty-nine, before me, Don Bernardo Antonio de Bustamente Tagle, lieutenant of the political and military governor of this kingdom of New Mexico, this royal possession was presented by Don Nicholas de Chaves in the suit which the residents and community of Belen have brought asking that the boundary that adjoins this tract be settled for them, and I, said lieutenant, having inspected the instrument of both parties and examined the tracts of both and (in view of) the confusion that exists as to whether it (the boundary) is or is not that which Captain Juan Gonzales Bas designated to this party when he placed him in possession of the other (boundary) which was designated by the said (Bas), after some delay on the petition of said community and residents I had to decide and determine having examined the boundary, that he asks for as fronting the San Pablo ponds (los esteros de San Pablo) and knowing that they have a beginning, a middle and an end, and it not being ex-
404 plained, except confusedly which of them he asked for as his boundaries (illegible) (torn) now to them I have designated for (part of word—rest of line missing) of said ponds with slight (rest of line missing) mound of stone and (rest of line missing) to obviate suits and remove (rest of line missing) justice which to it they remained (rest of line missing) this determined not (part of word—rest of line missing) nor to bring suit, they, their (part of word—rest of line gone) (part of word) should bring suit (rest of line missing) of this to them I impose a fine (rest of line missing) (part of word) that should cause suit (rest of line missing) to which I certify (rest of line missing).

BERNDO. ANTTO. DE BUSTAMENTE TAGLE
(Rest of line missing.)
Special Justice. [SCROLL.]

(Endorsed.)

Year —— of —— 1739.

On 4 leaves, one-half blank.

Royal possession in favor of Don Nicolas de Chaves and (one-fourth of a page missing). (Part of a scroll.)

Then follows certificate of surveyor general that above is a true translation of the original, designated as No. 2.

Note on Translation.

Note No. 1.—The original at this place is badly torn and very difficult to decipher, but I think the word used was "apprehendio"—he received—and I have so translated it.

WILL M. TIPTON, *Translator.*

405 Then follows certificate of surveyor general that Tipton was official interpreter and that his signature is genuine.

Year 1744.

(*Title Page.*)

Bernabe Baca against Nicolas de Chaves in relation to lands definitely decided in favor of the plaintiff and formal possession of the property in litigation given by the justice to whom it was referred by the Senor Major Don Joaquin Codallos y Rabal, governor and captain general of this kingdom of New Mexico, as is seen within.

The matter in controversy is entered and certified in the books of this government.

(End of title page.)

Decree.

At the town of Santa Fé on the third day of the month of March of the year one thousand seven hundred and fourty-four, I, Major Don Joaquin Codallos y Rabal, governor and captain general of this kingdom of New Mexico, and its provinces, having examined the executive proceedings that have been had between the parties, the one the plaintiff Barnabe Baca, and the other the defendant Nicolas de Chaves, and the complaint made against the aforesaid in relation to the ownership of a tract of land, the grants presented by both parties, and the presentations of both having also been examined with the rest which it was proper to inspect, I stated that I ought to and do declare as null and of no force or effect the grant that was made to the said Nicholas de Chaves in so far as it caused injury to the limits of the lands of the said Bernabe Baca, which was not
406 nor could it have been the intention of the gentleman (who was) my predecessor, and it is known to be so from the very terms of the decree of his grant which are the following: In virtue of representing to me that it is without injury to a third party. Therefore, the injury being proven, as it is, as much in the property of the said tract as in the pastures and watering places belonging to it, it is in accordance with law that there should be restored to the said Baca his lands according to their boundaries mentioned in the purchase he made of them as far as that which is called Tome, according to what the said Bernabe Baca understood at the time of the possession that was given to the opposing party as appears in these proceedings. In consequence whereof I commanded the chief alcalde of the town of Albuquerque, Baltazar de Abeytia, in virtue of this decree which shall serve as a peremptory order, to go immediately to give the royal and personal possession to the said Bernabe Baca of the tract in litigation, at the termination of which he will cause a perpetual landmark to be placed, which he will set forth as a judicial proceeding in the regular form, without permitting the said Nicholas de Chaves or another person in his name, any contest or appeal, that he may interpose and he will notify him in writing of this decree and of the perpetual silence that is imposed upon him in order that neither now nor at any time shall he attempt to proceed in what is thus decided, under the penalty of three hundred dollars, besides the interest of the

opposing party which shall be exacted from him irremissibly for any disobedience or contest that he may institute in writing or by word, and he shall also be notified under
407 the same penalty that he, the said Nicholas de Chaves shall not interfere personally or through any one acting in his stead, either by act or words, with the said Bernabe Baca or with any other person of his family, or his servants; which amounts I devote in third parts to the royal council of His Majesty to the rebuilding of the palace and the royal garrison and to court expenses, and these proceedings being concluded he will transmit them to his superior government under cover and with a reliable person. And thus I decreed and ordered definitely deciding *pro tribunali*, giving audience in my tribunal and acting by special authority with my attending witnesses with whom I act for the lack of notaries of which there is none in this kingdom, I certify.

JOAQUIN CODALLOS Y RABAL. [SCROLL.]

Witness:

JOSEPH ROMO DE VERA. [SCROLL.]

FRANCISCO MAGRINAN Y GAYA. [SCROLL.]

At this town of San Felipe de Albuquerque on the ninth day of the month of March of the year one thousand seven hundred and forty-four, I Captain Baltazar de Abeytia, chief alcalde and war captain of said town, the pueblo of San Augustin de la Isleta, place of Fonclara, and other places of its jurisdiction; in virtue of the decree enacted and pronounced by Senor Major Don Joaquin Codallos y Rabal, governor and captain general of this kingdom of New Mexico, in order that it be observed I ought to and did order that Nicholas de Chaves should be notified of said decree *de verbum ad verbo* which being done and understood by said party he obeyed
408 and immediately gave up said land; without any contest he proceeded to move away. In virtue whereof I immediately proceeded to give the royal possession that I am ordered to give and in witness thereof I set it forth as a part of the proceedings and signed it acting by special authority with attending witnesses for lack of a royal or public notary of which there is none in this kingdom. On said day *ut supra*.

[SEAL.] BALTAZAR ABEYTIA.

Witness:

SALVADOR GARCIA. [SCROLL.]

Witness:

ISIDRO SANCHEZ. [SCROLL.]

At the place of Our Lady of Guadalupe, jurisdiction of the town of San Felipe de Albuquerque, on the ninth day of the month of March of the year one thousand seven hundred and forty-four, I, Baltazar de Abeytia, war captain and chief alcalde of said town and the other (places) of its jurisdiction acting by special authority with attending witness for lack of a public or royal notary of which there is none in these parts, and with instrumental witnesses who were

Lieutenant Jacinto Barela and Gregorio Jaramillo residents of this jurisdiction, in virtue of the decree enacted by the superior government and the notification which is therein contained being made to Nicholas de Chaves, which being done, as it was, he obeyed with perfect compliance and without any contest and at the same time he was ordered to remove his house and corrals from the land of Bernabe Baca, which he endeavored to do whenever he could according to the pleasure of the opposing parties; and there being nothing else that might interfere with the royal and personal possession that I am ordered to give, I took said Bernabe Baca by the hand in ac-
409 cordance with law and gave him royal possession in the name of His Majesty (whom may God preserve) with all the necessary formalities and conditions. He called aloud, threw stones, and pulled up herbs, which (possession) he received quietly and peaceably, designating to him as a boundary on the south side the very same place that he said was his, which was the house that he said was Tome Dominguez's which being examined by me I find to be a ruin—remains of an apartment or room of eight or ten varas (in size). There I ordered him to place perpetual landmarks and I did not go to the other boundaries on account of this being the one in litigation and there being no controversy whatever about the others; and as I say said royal possession was given to him quietly and peaceably without injury to third parties in order that he might enjoy said lands for himself, his children, heirs and successors, with pastures, waters, woods and watering places; and this shall be a sufficient title to him in order that he may enjoy them as his own in the name of His Majesty (God preserve him) and in witness thereof for all time I set it forth in the proceedings and it is done on said day and I signed acting by special authority on the present common paper because there is none of the stamped kind in this kingdom. *Ut supra.*

BALTAZAR ABEITA. [SCROLL.]

Witness:
SALVADOR GARCIA. [SCROLL.]

Witness:
ISIDRO SANCHEZ. [SCROLL.]

(Then follows attestations by official interpreter and the surveyor general that the above is a true copy of the original documents.)

410 Year 1746.

(*Title Page.*)

Compromise executed by Nicholas de Chaves and Bernabe Baca, residents of the jurisdiction of the town of Albuquerque concerning a piece of land and the rest that in said compromise is contained, etc.

(End of title page.)

Being at the new settlement called Fuenclara on the eighteenth day of the month of October of the year one thousand seven hun-

dred and forty-six before me the Major Don Joaquin Codallos y Rabal, governor and captain general of this kingdom of New Mexico, I being in said settlement on my way to visit the town of Nuestra Senora de Guadalupe and the royal garrison of El Paso del Rio del Norte, on this day of the date there appeared Bernabe Baca and Nicholas de Chaves, both residents of the place of Belen of the jurisdiction of the town of Albuquerque and they stated that whereas they have agreed and covenanted voluntarily in the form that will be set forth notwithstanding what was decided in proceedings had before the superior government under my charge, and said stipulation and agreement are in the following manner and form: That the said Bernabe Baca cedes, donates, renounces and transfers for himself and in the name of his children, heirs, and successors to the said Nicholas de Chaves, two hundred and fifty paces of land from the termination of his boundaries on the north side as far as a large cottonwood tree which is in front of the corrals of which amount of land with its pastures, waters and watering places and entrances and exits he makes a gift and donation to the said Nicholas de Chaves, and to whomsoever may be a legal party through him, in
411 such manner that no claim or suit whatever shall be brought against him, and if any should be brought he will appear in his interest and defense until he puts him in quiet and peaceable possession, and if he should not do so he will give him a tract of land of the same size, similar to and as good, and in the place and spot which may appear best to him.

Item. The said Bernabe Baca abandons and relinquishes the right that he has acquired concerning the demolition of the house which in the decree as enacted in the proceedings referred to concerning the matter, it is decided should be demolished, and he consents that it shall remain standing as it has been up to the present and that he may use it as his own house had and acquired by just and lawful title such as is this agreement which they request me said governor and captain general to sanction by my authority and judicial decree as I do in so far as is permitted by law. And the said Nicholas de Chaves being present states that he accepts this donation as before referred to and he will use it and the property that is conferred upon him without trespassing in any manner whatever, and they will maintain perpetual peace in the future without either of them causing injury to the other, nor will they consent that their servants shall cause it; and for the fulfillment of that which has been stated the two together and each one for his own part, bind their persons, and their present and future property, and they therewith submit themselves to the law and jurisdiction of His Majesty's justices in order that they may force and compel them thereto as by sentence pronounced in an adjudicated cause, and the parties to the compromise, whom I said governor and captain general certify I
412 know, thus executed and signed it, the witnesses being Don Felipe Jacobo de Unanue, Joseph Baca and Miguel Lucero, who were present and those of my attendance, with whom I act for

lack of a royal or public notary of which there is none in this kingdom. I certify. Amended—B—valid.

JOAQUIN CODALLOS Y RABAL. [SCROLL.]
BERNABE BACA. [SCROLL.]
NICHOLAS DE CHAVES. [SCROLL.]

Witness:
MANUEL SANZ DE GARVIZU. [SCROLL.]

Witness:
JOSEPH ROMERO DE VERA. [SCROLL.]

(Then follow attestations by translator and surveyor general that the foregoing is a true copy and translation of the original on file.)

That the surveyor general on December 16, 1887, rendered a decision therein, of which the following is a copy:

(*Opinion — Surveyor General.*)

Private land claim of Nicholas de Chaves.

File No., 208; reported No., 155.

U. S. SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, N. M., *Dec.* 16, 1887.

This claim was filed in this office by the heirs and legal representatives of the said Nicholas de Chaves on the 11th of April last.

It is based upon an alleged grant made to the said Chaves by Don Gaspar Domingo de Mendoza, governor and captain general of New Mexico, dated June 1st, 1739.

413 The land claimed and covered by said grant is described in the petition of said Chaves as situate on the Rio Grande and bounded on the east by said river, on the west by the Rio Puerco, on the north by land of Captain Bernabe Baca, and on the south the lagoons called San Pablo.

On the 26th day of August following by direction of the governor, Captain Juan Gonzales Bas, alcalde mayor and war captain of the town of Albuquerque, proceeded to make juridical delivery of possession of the lands described, as is shown by the act of possession, which is attested by his signature and the names of two subscribing witnesses. In a marginal note dated Santa Fé, Sept. 30, 1739, it is stated by Governor Mendoza that "this royal title is entered in the government book which is kept in the archives of the capital in order that it may appear of record whenever it may be necessary," but no such record is found among the archives of New Mexico. On the contrary, the grant and act of possession, with other papers pertaining to the claim have been kept in the private custody of the grantee and his heirs until they were filed in this office as stated on the 11th of last April.

Then, for the first time, the public was advised of the existence of the claim, although nearly fifty years have elapsed since New Mexico was ceded to the United States, and no fact is alleged in explanation or excuse of this remarkable non-action on the part of the claimants;

while most of the lands have been surveyed by the Government of the United States, and appear as public lands open to settlement on the official plats of survey. These are the material facts
414 touching this claim, as shown by the documents relied on by the present claimants. The case is a novel one, but as it arises under the act of Congress of July 22, 1854, and the treaty of Guadalupe Hidalgo, it becomes my duty to examine it.

The grant bears the marks of genuineness, and is shown to be genuine by a comparison of the signature of Governor Mendoza with other signatures of his which are found among the archives of this office. The signature of the alcalde to the formal act of juridical delivery is also shown to be genuine, as also the signature of one of his attesting witnesses.

I feel bound therefore, to regard the grant as genuine.

Its validity, however, is subject to conditions subsequent, which the royal laws of Spain annexed to it, touching the actual settlement of the land by the grantee, and the making of certain improvements thereon. A compliance with these conditions must be shown, although the grant was one *in presenti*.

Have they been complied with?

I think it will not be difficult to answer this question.

The grantee, in his petition to the governor, recites that he was in possession of the land by the express permission of the governor who preceded Governor Mendoza, and that he had built a cabin and placed his stock on the land and maintained possession of it with considerable trouble and danger from the heathen. Governor Mendoza, in making the grant, declares, that "having examined this petition I have approved it, and in view of that which Don Nicholas de Chaves sets forth, contained in this writing, I make him a
415 grant," etc. The actual possession of the grantee and the holding of the same, and the building of a cabin on the land are thus impliedly recognized by the governor and made a part of his inducement in making the grant.

The validity of the grant, as alleged in the papers was recognized by the Spanish authorities by reference to it in 1742, in the grant then made to Belen; in 1744, in a contest before the Mexican authorities respecting the northern boundary of the grant; in 1746, when the governor who succeeded Mendoza went upon the ground and affected a compromise between Nicholas de Chaves and Bernabe Baca, concerning said northern boundary; and in 1749, when the southern boundary of the grant was in dispute and judicially determined.

In all these cases it is fairly if not necessarily implied that the conditions attaching to the grant had been complied with, since it is not to be presumed that otherwise its validity would have been accepted.

I do not think it was required to prove an actual compliance with these conditions by living witnesses, because the action of the Spanish authorities in repeatedly admitting such compliance by implication made such proof unnecessary in this hearing.

The testimony, however, does show a continuous possession of the

land by the heirs of the grantee for nearly 90 years, and that their settlement on it was an old one early in the present century, according to the oldest inhabitants, and as indicated by improvements on the land which were then in a state of decay.

The heirship of the grantee is sufficiently shown, and in the absence of any denouncement of their title I think I am fully
416 justified in the conclusion I have stated.

There is, however, another question involved in this claim which invites consideration.

In a paper signed by Governor Mendoza, dated Oct. 26, 1743, in which he fixes the boundaries of the grant, he says it is "understood that in this, as in other grants the pastures, entrances, exits and waters are common, excepting the cultivated lands and enclosures, and other places which may be to the grave damage to the owner; and I signed it in order that it may be observed."

It thus appears that only the cultivated lands were granted in fee, and that the remainder was "common" or free to all; but this was simply a recognition of the law of Spain, and would have governed the grant if the language I have quoted had been omitted. The papers in the case do not show the area of the grant as bounded, but I infer from the statements of some of the witnesses and the official map of it that it is not less than 50,000 acres.

It is much more than is now asked for by the claimants, who only occupy and cultivate a comparatively small portion. It was not the policy of Spain to grant large tracts of pasture land in fee, but only the temporary use thereof, leaving the fee in the government, subject to its future disposal.

In White's Collection of Civil Laws of Spain and France, I find the following:

"The concession of a great extent of land for the raising and pasture of cattle constitutes no more than the usufruct of it for the time agreed upon, but the grantee has not, nor ever had, the most remote right to solicit the proprietorship, for there is no law
417 or regulation upon which to found it, and consequently the land does not go out of the class of public lands, since it is the same as if it was held on rent." Vol. 2nd, page 287. On page 57 of the same volume I quote the following: "We command that all pastures, mountains and waters, in the provinces of the Indias, be common to all the inhabitants thereof, present and to come, and that they may freely enjoy the use of them, and construct their huts near their pens, drive therein their cattle, either herds or separately, at their option, all ordinances to the contrary notwithstanding." Quoted from Lib. IV, tit. 17, law 5. See also 5 Texas Rep., page 62.

According to these authorities, Governor Mendoza had no power to grant the fee of pasture lands enclosed in the boundaries specified in the grant, which must be held void except as to the lands actually cultivated and occupied, for certainly there could be no exclusive proprietorship in lands that were made open and free to everybody.

The particular boundaries and the actual area of such cultivated lands are not shown with any definiteness by the testimony on file,

and I can therefore simply recommend the confirmation of the grant to the extent of such cultivated land, the area and boundaries of which can only be accurately determined by a survey.

Copies of this opinion in triplicate as required, with like copies of other papers in the case, are forwarded herewith for the consideration of Congress.

GEO. W. JULIAN,
Surveyor General.

418 That as stated in the opinion of said surveyor general, the grant papers showing the original grant were never in the public archives of the surveyor general's office of New Mexico, or filed in any other public office, or placed in any other public record in the Territory of New Mexico, but were retained in the private possession of the persons claiming to own the same, until filed with said petition in the surveyor general's office, April 11, 1887; but there were in the Spanish archives in the office of the surveyor general a number of other papers tending to show the existence of the grant.

That subsequently the surveyor general reported said claim to the Commissioner of the General Land Office, and on June 9th, 1890, the surveyor general transmitted to the Commissioner of the General Land Office a letter, of which the following is a copy:

SANTA FÉ, N. M., *June* 9, 1890.

Hon. Commissioner of the General Land Office, Washington, D. C.

SIR: You are respectfully informed that in my opinion there should be reserved from entry, by reason of the Nicholas Duran de Chaves grant, No. 155, all of the surveyed lands in township No. 5 N., R. 2 E., in New Mexico, comprising section 6, and fractional sections 4, 5, 7 and 8; also the surveyed lands of township No. 6 N., R. 2 E., New Mexico, comprising sections 30 and 31, and fractional sections 19, 20, 21, 28, 29 and 32.

The aforesaid comprise substantially the cultivated and occupied lands pertaining to said grant in regard to which portion of said grant Surveyor General Julian reported favorably in his opinion, dated Dec. 16, 1887.

Very respectfully, EDWARD F. HOBART,
Surveyor General.

419 That the Commissioner of the General Land Office on June 21st, 1890, wrote to the surveyor general of New Mexico a letter, of which the following is a copy, together with the letter of the surveyor general to the register of the United States land office at Santa Fé:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 21, 1890.

United States surveyor general of New Mexico, Santa Fé, N. M.

SIR: I am in receipt of your letter of the 9th inst., in which you recommend the reservation of sec. 6 and fractional secs. 4, 5, 7 and

8 in tp. 5 N., R. 2 E., and sections 30 and 31, and fractional sections 19, 20, 21, 28, 29 and 32, tp. 6 N., R. 2 E., New Mexico, covered by private land claim of Nicholas Duran de Chaves.

This claim was reported as No. 155 by U. S. Surveyor General Julian Dec. 16, 1887, whose recommendation was for the confirmation of the grant to the extent of the cultivated land, the boundaries of which can only accurately be determined by a survey.

As this claim has been reported upon favorably by your office under the 8th section of the act of Congress approved July 22, 1854 (10 Stats., 308) the lands contained within the limits as approved, should be reported to the register and receiver of the district in which the land is situated, with any necessary information, so that they may withdraw from entry all of the land contained therein.

Respectfully, LOUIS A. GROFF,
Commissioner.

420 DEPARTMENT OF THE INTERIOR,
OFFICE U. S. SURVEYOR GENERAL,
SANTA FÉ, N. M., *June* 26, 1890.

Register of U. S. land office, Santa Fé, N. M.

SIR: You are hereby informed that there should be reserved from entry, by reason of the Nicholas Duran de Chaves grant No. 155, all of the surveyed land of township No. 5 N., R. 2 E., New Mexico, comprising section 6, and fractional sections 4, 5, 7 and 8, and also the surveyed lands of township No. 6 N. R. 2 E., New Mexico, comprising sections 30 and 31, and fractional sections 19, 20, 21, 28, 29 and 32.

Very respectfully, EDWARD F. HOBART,
Surveyor General.

That on August 23rd, 1893, this grant having been presented to the United States court of private land claims, sitting in the Territory of New Mexico, the court rendered the judgment, of which the following is a copy:

Decree.

In the Court of Private Land Claims, Sitting in the Territory of New Mexico.

JOSE CHAVES Y GALLEGOS ET AL.
vs.
UNITED STATES ET AL.

This cause having heretofore come on for hearing upon the pleadings and exhibits on file, upon proofs taken in open court, as well *as* on behalf of defendants as on behalf of petitioners, and upon proofs taken before the surveyor general of New Mexico, full legal proof having been taken and counsel having been heard for said

parties, and the petition in this cause having been sustained
421 by satisfactory proofs, after due deliberation, the court being now sufficiently advised in the premises, makes the following findings of fact:

1. That in the year 1739, Nicholas Duran de Chaves petitioned the then governor and captain general of New Mexico, Gaspar Domingo de Mendoza, for the grant of a piece of land on the banks of the Rio del Norte, the boundaries of which were, on the east the said river, on the west the Rio Puerco, on the north the land of Captain Bernabe Baca and on the south the lagoons or esteros called San Pablo; that on the first of June, 1739, the said governor granted said land to said petitioner and directed the alcalde mayor of Albuquerque, to put the grantee in possession of the lands; and that on the 26th of August, 1739, the said alcalde mayor, in accordance with the order of the governor, delivered possession of said lands to the said grantee with the following boundaries: On the east the Rio del Norte; on the south Los Esteros de San Pablo; on the west the Rio Puerco; and on the north a little round lagoon (esterito redondo) which was grown up with rushes.

2. That the said grant was afterwards recognized and confirmed by an order of the governor, dated October 26, 1743, and was further recognized by the lieutenant governor of New Mexico on the second of June, 1749, when that officer made a record of his decision as to a dispute concerning the southern boundary of the grant, from which it appears that the northern boundary of the Belen grant was to be the southern boundary of Nicholas Duran de Chaves' grant.

3. That a dispute having arisen between said grantee and
422 the said Captain Bernabe Baca whose land formed the northern boundary, as to the location of the line between them and a judicial decision having been rendered in favor of said Baca, by an agreement subsequently made between said parties, dated October 18, 1746, said Baca ceded a portion of his land to said grantee so as to establish the division line at the house of said grantee.

4. That the ruins of the said house of said grantee are at a point about a mile and a half south of the town of Los Lunas and are to be taken as fixing the northern boundary of the grant under consideration.

5. That the land included in said grant has been in the possession of said grantee, his heirs and legal representatives continuously from the year 1739 down to the present time, and that the petitioners are lineal descendants of the original grantee, and as such, are by inheritance the lawful successors in interest in part to the rights of said original grantee.

6. That on the third day of November, 1891, the said United States issued to one Robert N. Stockton, a patent for a portion of the land included within said grant, which portion of said land is described in said patent as lot numbered three the northeast quarter of the southwest quarter, and the west half of the southeast quarter of section thirty in township six north of range two east of the New Mexico meridian, containing one hundred and sixty-six and twenty-eight (28) hundredths acres.

7. That on the third day of April, 1889, the said United States issued to one Barbara Chaves de Sanches, a patent for a portion of the land included within said grant which portion of said land is described in said patent as the southwest quarter and the
423 northwest quarter of the southeast quarter of section twenty in township six north of range two east of the New Mexico meridian, containing one hundred and fifty-seven and thirty-six one-hundredths acres.

8. That on the second day of December, 1891, the register and receiver of the local land office of the United States situate at Santa Fé, New Mexico, issued to one Valeneslado Baca a final receipt for the payment of the fees and costs fixed by law for the entry of another portion of said land described in such final receipt as the southeast quarter of the southwest quarter and lot four of section thirty in township six north of range two east of the New Mexico meridian, containing eighty-six and seventy-six one-hundredths acres, and for which a patent, dated December 20, 1892, was issued by said United States to said Baca.

The court finds, as matter of law, that by reason of the facts hereinbefore set forth, a title to all of the lands embraced within the boundaries aforesaid, was vested in the said Nicholas Duran de Chaves, which title was complete and perfect at the date when the United States acquired sovereignty over the country now embraced within the Territory of New Mexico, and within which said grant is situate, and that a confirmation thereof should be made to the heirs and legal representatives of the said Nicholas Duran de Chaves as prayed in the petition herein.

The court further finds, however, as to those portions of said lands referred to and described in the sixth, seventh and eighth findings of fact, the same having been sold or granted by the United States to other persons, such titles from the United States to such
424 other persons shall remain valid, notwithstanding this decree, in accordance with the restriction and limitation upon the power of this court imposed by the terms of the act of Congress under which it is organized.

The court further finds that the Atlantic & Pacific Railroad Company is not entitled to any portion of the land embraced within the boundaries of said grant.

The court hereby specifies that the said land is located within the county of Valencia in the Territory of New Mexico; that it is bounded on the north by an east and west line drawn through the northern side of the ruins of the house of said Nicholas Duran de Chaves as hereinbefore described and located; on the east by the Rio Grande del Norte; on the south by the northern boundary of the Belen grant, and on the west by the Rio Puerco; and it further specifies that the estimated area of said land, no survey thereof ever having been made, is about fifty thousand acres.

It is therefore ordered, adjudged and decreed by the court that the claim for the land embraced within said grant as hereinbefore described and set out, be, and the same hereby is, confirmed to the heirs and legal representatives of Nicholas Duran de Chaves, with

the limitation and proviso, however, that the title from the United States to other persons for portions of said lands hereinbefore referred to in the sixth, seventh, and eighth findings of fact, shall remain valid notwithstanding this decree, and leave is hereby given to the petitioners to apply at the foot of this decree, if they shall see fit so to do, for a money judgment against the United States for the value of said portions of said lands in accordance with the
425 provisions of the fourteenth section of the act of Congress under which this court has been created and organized.

It is declared by the court that the confirmation in this decree contained is made under title XII of Book IV of the Recopilacion de Leys de los Reynos de las Indias, the royal decree of the King of Spain of October 15, 1754, and the law of nations.

JOSEPH H. REED,
Chief Justice.

Accompanying this judgment and decree was an opinion of the court of private land claims, of which the following is a copy:

Opinion of the court by chief justice, concurred in by Justices Fuller and Sluss, in case No. 57, "Nicholas Duran de Chaves grant."

"Holding that lands granted by the United States must be excluded from the operation of the decree."

Delivered August 7, 1893.

Case No. 57.

Chief Justice REED delivered the opinion of the court verbally, the official report of which is as follows:

This grant belongs to the class of grants which are recognized as having been perfect and complete at the time the United States acquired jurisdiction over this Territory, and a decree will be entered confirming it as such to the original grantee and his heirs, assigns and legal representatives.

The question of importance arises out of the fact that the public surveys have been extended over a portion of the land, and a number of subdivisions have been entered and patented under the general land laws. The question is whether these tracts
426 shall be excluded from the operation of the decree. A majority of the court are of the opinion that they must be so excluded.

The authority for bringing and prosecuting an action for the confirmation of a complete and perfect grant is conferred by section eight (8) of the act creating this court; that section provides, that, upon the application of any person or corporation claiming lands under a complete and perfect grant, the court shall proceed to hear, try and determine the validity of the claim and the right of the claimant, its extent, location and boundaries, and if the title so claimed shall be established and confirmed, such confirmation shall

be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States. Section fourteen (14) of the act contains the following provision: "That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted and, etc., etc."

The holding that the subdivisions of land must be excluded from the operation of the decree is based upon these provisions,
427 in the opinion of the majority of the court these provisions create a limitation upon the power and jurisdiction of the court. This court is one of limited jurisdiction and has no general powers; it cannot therefore in any case grant a larger decree of relief than is provided for in the act creating it.

There is another view which we think is quite as conclusive of the question involved. The fact as to the validity of and extent of these land grants has always been in dispute and controversy between the Government and the claimants; for the purpose of settling or having settled that dispute and controversy, the Government has created a tribunal in which it authorizes parties holding grants or claiming grants, of the character of that in question to sue the Government, and the court is given jurisdiction to determine the question at issue between the parties. But in the act creating the court, the Government has said in effect to all such claimants, that if you do bring your cases before this tribunal for the purpose of securing such benefits as will accrue to you under its judgment of confirmation, you must at the same time consent to relinquish all right to such lands within your grant as has heretofore been disposed of by the Government.

Now, it seems to us that when a party comes into this court and claims a confirmation of his grant under the provisions of the act, he necessarily consents to relinquish all that portion of the land which has been heretofore disposed of by the Government and accept a money consideration therefor as provided for in the act.

Therefore we hold that the lands in question must be excluded from the operation of the decree and the plaintiff may take such further action as he deems proper for the purpose of securing
428 the money judgment provided for in lieu of such land.

Justices Murray and Stone dissented.

Subsequently a survey was made under the decree of the court of private land claims, and this survey was confirmed in May, 1895, by said court, by an order of which the following is a true copy:

UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims, Santa Fé District, May Term, 1895.

J. CHAVES Y GALLEGOS ET AL.
vs.
UNITED STATES. } No. 57.

This cause coming on to be heard in open court on the 29th day of May, 1895, on the motion of said plaintiff for the approval of the survey of the grant confirmed herein, executed by Sherrard Coleman, U. S. deputy surveyor, under contract with the surveyor general of New Mexico, No. 285, dated June 16th, 1894, and the plat thereof, transmitted by the Commissioner of the General Land Office to the court for examination; F. W. Clancy, Esq., appearing for said plaintiffs, and Matt G. Reynolds, Esq., appearing for the United States, and no objection to said survey having been filed with the surveyor general, the court, after due examination and deliberation, finds that the said survey is in substantial accordance with the decree of confirmation heretofore entered in this cause.

It is therefore ordered by the court that the said survey executed as aforesaid be and the same hereby is approved and that the clerk of this court endorse upon the face of the said plat the approval of this court of said survey and plat, and also endorse thereon
429 all reservations contained in the act establishing this court, to wit: the decree of confirmation in said cause does not confer any right or title to any gold, silver, or quicksilver mines or minerals of the same within said grant; the said decree does not conclude or affect the private rights of persons in said tract as between each other, and said decree has no effect as against the title of any lands within said grant which have heretofore been granted, sold, or disposed of by the United States, but all of such lands are excepted from the operation of said decree.

That prior to the survey and confirmation thereof, it would not have been possible for any person to have ascertained or determined where the right of way entered and left the lands covered by said Spanish grant. The location of the northern boundary line, which is crossed by the right of way, both in going into the grant and in coming out, was always a matter of dispute between the parties claiming this grant and the owners of the grant lying to the north.

That the point where the right of way crosses the northern line of this grant going west, is about twelve (12) miles distant from the Rio Grande valley, where the settlements upon this grant were, and that that portion of the lands of the grant covered by the right of way was and is and always has been a sandy desert tract of high table-land, uninhabited and unoccupied.

That the right of way of said railroad company on going west on crossing the west line of the San Clemente grant, crosses a small piece of public land and then crosses in a northwesterly direction the south and west lines of a Spanish grant known as the Antonio

Sedillo or Cañada de los Apaches grant; that the length of the right of way over the land contained within the exterior limits
430 of this grant is thirteen miles; that the history of this grant is as follows:

The grant was executed in 1769. The petition was filed in the office of the surveyor general of New Mexico on April 6th, 1871. On November 6th, 1871, the surveyor general reported to the Interior Department, approving the grant. In April, 1872, the report of the surveyor general was transmitted to Congress, and on October 11th, 1886, a supplemental report *fas* made by the then surveyor general recommending the rejection of the claim, and on November 24th of that year this report was transmitted by the surveyor general to the Commissioner of the General Land Office. In September, 1877, a preliminary survey was made under the direction of the surveyor general, which shows the grant, except as to the north boundary, just as subsequently confirmed by the land court. On December 6th, 1887, the supplemental report of the surveyor general recommending the rejection of the claim, was transmitted to Congress.

That the grant papers showing the title to this grant are as follows:

Year of 1769.

To His Excellency the governor and captain general:

I, Antonio Sedillo, a reformed sergeant of this presidio, humbly appear with due veneration before Your Greatness, in the best form in which I am permitted to do, and say to you, sir, that at the time when this kingdom was governed by His Excellency Francisco Antonio Marin de Valle, I and other neighbors of mine presented a petition asking a grant of lands called "Los Quelites," which was granted and given to us, and which we inhabited for four
431 years, and it is now three years since the same was abandoned on account of the great risk and the small forces we had for such a frontier. I therefore apply to the Catholic zeal of Your Excellency, and humbly kneel down before your royal patronage, asking that Your Excellency concede to me a tract of land, which at the end of the aforementioned grant I have registered, and which is called La Cañada de los Apaches. Its boundar*ies* on the east is a hill called Serro Colorado, which is the boundary of those of Atrisco; on the west the point of a table-land, which runs in said direction, and which comes out of the said cañada; on the north the grant of the settlers of Rio Puerco; on the south the boundary of Mateo Pino. This I expect from the Christian zeal of Your Excellency, and if at any time the said place should become settled, I shall put no obstacle to their enjoying it, if they do not prejudice me in the possession of my part, which I so humbly ask for, and which I claim on account of having no land of my own where to maintain my large family, and because I am a poor man, and have been for over twenty years in the royal service, as a private soldier, as a corporal, as a sergeant, and on various occasions as a commanding judge, and at present as chief alcalde of the pueblos of Acoma, Laguna, and Zuni, for all of which I pray Your Excellency to be

pleased to direct your attention to me, and to favor me with your accustomed kindness, and to grant my petition, whereby I will receive benefit and grace. I declare with due solemnity that it is not from malice, and as may be necessary.

ANTONIO SEDILLO.

432 At the city of Santa Fé, on the 20th day of the month of April, one thousand seven hundred and sixty-nine, the above petition was presented by the petitioner, and in consideration of his services, and for other reasons which he sets forth, I, Pedro Fermin de Mendinueta, of the order of Santiago, colonel of the royal army, governor, and captain general of this province of New Mexico, declared, that in the name of His Majesty (whom God protect) conceded, and do concede, as a grant to Antonio Sedillo, the tract of land he asks for, with the boundaries he men'ions, and under the conditions in his petition contained, and also that he settle the tract in the terms and forms prescribed by the royal laws; and further that he do not sell the same to any ecclesiastical party, and without prejudice to any third party having a better right; and said grant I make to him, his children, and heirs and successors, under the corresponding conditions, and confer all necessary legal authority to Carlos Mirabal, to proceed after summoning the adjoining settlers, and if no contradiction is raised by a legitimate party, to put said Antonio Sedillo in possession of the tract of land aforesaid, in the accustomed manner, and, making a duplicate of the whole, he shall deliver to the aforementioned Sedillo that it may serve him as a sufficient title, and he shall return the originals that they may be filed where they belong, and thus I, said governor and captain general provided, ordered and signed, and with the undersigned attending witnesses, there being no notary of any kind in this jurisdiction, to which I certify.

PEDRO FERMIN DE MENDINUETA.

MATHEO DE PENAREDONDA.
ANTONIO MORETO.

433 At this place of Santa Cruz de Guadalupe, jurisdiction of the city of Albuquerque, on the 25th day of the month of April of the present year, one thousand seven hundred and sixty-nine, appeared before me Carlos Jose Peres de Mirabal, Captain Antonio Sedillo, with the grant of lands given by His Excellency Pedro Fermin de Mendinueta, knight of the order of Santiago, colonel of the royal armies, governor and captain general of this province, castellan of its royal forces and garrison. In consideration of what His Excellency provides and commands, I proceeded to the aforementioned tract, accompanied by two attending witnesses, these being Captain Baltazar Baca and Manuel Torres, to give royal possession, summoning the adjoining settlers of Atrisco, as well as those of Rio Puerco, who saw the petition and decree, viz: Manuel Vaca, Jose Chaves, and the present Lieutenant Juan Bautista Montano, as also the Navajo Apaches, who said that the petition was good, and that they had nothing to interpose against the possession about to

be given, and, seeing that no person had a right to it, I took the aforementioned Sedillo by the hand, led him around; he pulled up grass, threw stones, and all of us shouted long live my lord, the king, when I gave him possession in the name of His Majesty, whom God preserve, which he received as a royal and true grant, with its boundaries on the east the Puerco river, on the west the point of table-land which runs in the said direction and which comes out of said Cañada de los Apaches, on the north the grant of the Rio Puerco, on the south the boundary of Mateo Pino; and in testimony whereof I sign this, together with the aforementioned witnesses of my attendance, on said day, month and year for the want of a royal or public notary, there being none in this province, to which I certify.

434 CARLOS JOSE PEREZ DE MIRABAL.

Witness:
BALTAZAR BACA.

Witness:
MANUEL TORRES.

That on June 13th, 1892, a claimant of this grant filed a petition in the court of private land claims, sitting in Santa Fé, New Mexico, of which the following is a copy:

UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims, Sitting in the Territory of New Mexico, at the City of Santa Fé.

LOUIS HUNING
vs.
THE UNITED STATES.

To the honorable chief justice and associate justices of said court:

Louis Huning, a resident of the county of Valencia, Territory of New Mexico, brings this his petition against the United States, as defendants, and shows to the court the following:

1. On the 20th day of April, 1769, Antonio Sedillo presented to the then governor of the province of New Mexico, Pedro Fermin de Mendinueta, his petition, asking for a tract of land called the Cañada de los Apaches, and bounded on the east by a hill called the Serro Colorado, which is the boundary of those of Atrisco, on the west the point of a mesa which runs in said direction and which comes out of the said cañada, on the north the grant of the settlers of the Rio Puerco and on the south the boundary of Mateo Pino; and the said governor on the day aforesaid granted the said tract of land with the boundaries mentioned to the said Antonio
435 Sedillo and directed Carlos Mirabal to put the said Sedillo in possession of said tract of land in the usual manner. On the 25th day of April, 1769, Carlos Jose Peres de Mirabal in accordance with the authority contained in the grant made by the governor

proceeded to put the said Sedillo in possession of the land aforesaid, declaring the boundaries, however, to be on the east the Rio Puerco, on the west the point of a mesa which runs in said direction and which comes out of the Cañada de los Apaches, on the north by the Rio Puerco grant and on the south by the boundary of Don Mateo Pino. A copy of said petition, grant and act of possession is filed herewith as Exhibit A and a translation thereof as Exhibit B, both in duplicate, the original being on file in the office of the surveyor general for New Mexico as a part of the documents in private land claim No. 50.

2. A claim for said grant was presented to the surveyor general for New Mexico on the 6th of April, 1871, and on the 15th of June, 1871, that officer made his decision approving said claim and recommending its confirmation by Congress with the boundaries set forth in the act of juridical possession, and with an estimated area of one hundred and six thousand two hundred and seventy-two acres of land. The opinion of the surveyor general was transmitted to Congress but so far as this petitioner is informed no action relative to said claim has ever been taken by that body.

3. In the year 1886, the then surveyor general for New Mexico, Mr. George W. Julian, undertook to re-examine the said claim, and under date of the 11th of October in that year made what is
436 called a supplemental opinion, recommending that the claim be rejected for the reason that there was no proof that the grantee had settled the tract in the terms and form prescribed by the royal laws in the year 1769. The said supplemental opinion was, as this petitioner is informed and believes, forwarded to Congress for its action, but so far as this petitioner is informed no action thereupon has ever been taken by Congress.

4. The said grant was surveyed under the direction of the surveyor general for New Mexico in September 1877, and according to that survey was found to contain 88,079.78 acres, and a tracing of the plat of said survey is filed herewith and marked Exhibit C. This petitioner avers that said survey is manifestly incorrect inasmuch as the mesa which comes out of the Cañada de los Apaches and which is the western boundary is left entirely outside of the grant by the surveyor and some distance north of the northwestern corner of the survey, and that said survey is erroneous is further shown by the recent decision of the court in the case of the Rio Puerco or Bernabe Montano grant, by which the southern boundary of that grant is found to be far to the north of where it was located by the surveyors in the field, the southern boundary of that grant being the northern boundary of the grant for the confirmation of which this petition is filed; and this petitioner claims in addition to that which is shown upon the tracing filed herewith all of the land to the north as far as the southern boundary of said Rio Puerco grant, the amount of which, however, he is unable to estimate.

437 5. Said tract of land is situate in the counties of Bernalillo and Valencia, in the Territory of New Mexico and the boundaries thereof are as hereinbefore set forth. So far as this petitioner

is informed or has any knowledge there are no person or persons in possession or claiming the same or any part thereof otherwise than by permission of this petitioner and in subordination to and under claims derived from the original grant to Antonio Sedillo, with the exception of the Atlantic & Pacific Railroad Company, which, as this petitioner is informed, claims a portion of the land north of the said survey and west of the surveyed lands of said Rio Puerco grant, but this petitioner hereby expresses his willingness that so much of said land as is so claimed by said railroad company, the same being the alternate odd-numbered sections according to the public land surveys, may be by this court excepted from the confirmation hereinafter prayed for.

6. This petitioner further avers that said grant has been claimed and possessed by the heirs and legal representatives of said Antonio Sedillo as far back as evidence of the fact can be obtained from living witnesses, and that he is the legal successor in interest, in part, to the rights of said original grantee, Antonio Sedillo.

Your petitioner therefore prays that his claim for the said tract of land, with the boundaries as hereinbefore set forth may be confirmed by the decree of this court to the heirs and legal representatives of the said Antonio Sedillo.

LOUIS HUNING, *Petitioner*,
By J. FRANCISCO CHAVES AND
FRANK W. CLANCY,
His Solicitors.

438 That thereafterwards, on December 17th, 1892, a decision was rendered by said court of which the following is a copy:

In the Court of Private Land Claims, Sitting in the Territory of New Mexico.

LOUIS HUNING
vs.
UNITED STATES.

(Cañada de los Apaches.)

This cause having heretofore come on for hearing upon the pleadings and exhibits on file, and upon the proofs taken in open court, as well on behalf of the defendants as on behalf of the petitioners, full legal proof having been taken and counsel having been heard for all said parties, and the petition in this cause having been sustained by satisfactory proofs, after due deliberation, the court being now sufficiently advised in the premises, makes the following findings of fact:

1. That a grant was made on the 20th day of April, 1769, to Antonio Sedillo by the then governor of the province of New Mexico, Pedro Fermin de Mendinueta, of a tract of land, and that on the 25th day of April, 1769, Carlos Joseph Perez de Mirabal duly delivered possession of said land to said grantee, in accordance with the order of said governor, and that the land so granted and delivered

was bounded on the east by the Rio Puerco, on the west by the point of mesa which runs in that direction, and which comes out of the Cañada de los Apaches, on the north by the Rio Puerco grant, and on the south by the boundary of Don Mateo Pino.

2. That the land embraced within said grant has been
439 claimed and possessed by the heirs and legal representatives of said Antonio Sedillo as far back as evidence of the fact can be obtained from living witnesses.

3. That the petitioner is the legal successor in interest, in part, to the rights of said original grantee Antonio Sedillo.

The court finds as matter of law, that the said grant to the said Antonio Sedillo and the delivery to him of judicial possession thereof, vested in him a title which was complete and perfect at the date when the United States acquired sovereignty over the territory where such land is situate, and that the petitioner is entitled to a confirmation of his claim as prayed in his petition, to the heirs and legal representatives of the said Antonio Sedillo; and this finding, and the confirmation in this decree contained, are based upon the provisions of the royal order of the King of Spain, dated October 15, 1754.

The court hereby specifies that the said land is located within the counties of Bernalillo and Valencia in the Territory of New Mexico, on the west side of the Rio Puerco; that the boundaries thereof are as hereinbefore set forth; but it particularly specifies that the northern boundary line is not to be north of the Cerro Colorado; and it further specifies that the area of said land is about 88,079.78 acres, according to the survey thereof made in the year 1877 under the direction of the surveyor general for New Mexico.

It is therefore ordered, adjudged and decreed by the court that the claim of the petitioner for the land embraced within the said grant as hereinbefore described and set out, be, and the same hereby
is, confirmed to the heirs and legal representatives of Antonio
440 Sedillo.

It is further ordered, adjudged and decreed by the court in accordance with the terms of the stipulation on file in this case, made by the petitioner and the Atlantic & Pacific Railroad Company, that the station grounds of said railroad company, and its right of way two hundred feet in width, being one hundred feet on each side of the center of its track, through the land hereinbefore described, are excepted from the effect and operation of this confirmation.

JOSEPH R. REED,
Chief Justice.

Dec. 17, 1892.

That the survey of said grant, made under and in pursuance of the decision of the court of private land claims, has not yet been approved; that where the right of way crosses this grant, at the time of its location, and ever since that time, the lands were unınclosed, uncultivated and unoccupied, and consisted entirely of high desert

lands, with nothing to distinguish the lands of the grant from the public lands of the United States.

That, outside of the statement herein contained, there has been no segregation of this grant from the public domain; and the officers of the railroad company, of the receiver and of the United States Trust Company had no more knowledge of this grant than they had of any of the others, as herein stated.

That, prior to the determination by the court of private land claims, it would not have been possible to locate the exterior lines of said grant, except as the preliminary survey may have shown them.

441 That neither the Atlantic & Pacific Railroad Company nor its receiver or assigns, have acquired by purchase or by condemnation any portion of the right of way over the lands contained in the last-named grant.

That when the claim for this grant was pending before the court of private land claims the Atlantic & Pacific Railroad Company was a party to it and filed its answer in the cause, claiming, among other things, the ownership of this right of way by virtue of section two of the act of Congress approved July 27, 1866; and that the grant claimants and the Atlantic & Pacific Railroad Company filed the stipulation referred to in the decree of the court.

That upon leaving the west line of the above grant, the right of way of the said railroad company crosses the public domain for a distance of about 8 miles and then enters lands known as the Laguna Indian Pueblo tracts, crossing a portion of these tracts in a northwesterly course, and after passing through the pueblo of Laguna and across public land, it again crosses another of these tracts; the entire distance of the right of way across these tracts is about 7 miles. The history of these tracts is, that prior to 1859, a claim therefor was presented to the surveyor general of New Mexico, and was transmitted with his approval to the Commissioner of the General Land Office, and by such Commissioner transmitted to Congress, and the claim was confirmed by act of Congress approved June 21, 1860. That the first survey was made in 1877, and this survey was approved in June, 1877, and on September 22, 1884, a patent was issued. That the character of the country covered by this grant is the same as that covered by the other grants, except that at the

442 time of the location of the right of way there were small tracts cultivated by the Indians in this grant, and since, but no enclosed land. That none of the officers or agents of the railroad company or the receiver ever had any other or further knowledge concerning this grant than they had concerning any of the others, except as herein shown and except that which grew out of the fact of the cultivation of these small tracts of land, some of which the right of way passed through, but the exterior boundaries were never determined or segregated until the survey made in 1877. That the grant papers containing all the history of this grant as it was presented to Congress at the time of its approval, are as follows, to wit:

Grant No. 1—Translation.

Don Jose Manuel Aragon, chief justice and war captain of these pueblos of Acoma, Laguna, settlement of Ceballeta, and its districts:

In view of the resignation I have tendered of the office I have held on this frontier for the period of over twenty years, Jose Alarrigua, governor of this pueblo of San Jose de la Laguna, and the chiefs thereof, together with their interpreter, Antonio Herrera, appeared before me, asking me to leave them a statement of the government and orders given by the honorable governors of this province, urgently requesting me to see if by this means they could be relieved from the disorders and grievances the pueblo formerly suffered in the changes of justices and ministers and providing against a recurrence of the same thing in the future; and, in compliance with this just demand, I have executed on this paper this declaratory statement, saying, as I do say, that being present at the general visit made to
443 this pueblo by Governors Don Fernando Chacon, Don Joaquin del Real Alencaster, Don Alberto Maynes, and Don Jose Manriques, authorizing these Indians to extend their fields beyond the league granted to them by the king as far as they could plant, for the actual support and maintenance of their families. The pueblo being situated in such a locality as not to afford them a sufficient quantity of arable land within the league allowed them by the king, and this pueblo having formerly suffered this scarcity of land for cultivation when this province was governed by Don Thomas Veles Cachupin, these Indians purchased the rancho called Pagnati, situated to the north and adjoining the site of Ceballeta, distant three leagues from this pueblo. This rancho was formerly granted to Pasual Pagarito, Vicente Pagarito, Antonio Pagnati, and Miguel Magnino, and having possessed it for thirty years, they sold it to the pueblo; and certain citizens having petitioned and asked for permission to settle there they have not been allowed to do so by the superior government, as it was a purchase made by the Indians who held a deed authorized by the former justice of the peace of this pueblo, Don Antonio Sedillo.

In regard to the land toward the east, they have been allowed to plant on the rancho known as El Rito, and therefore also the gigante cañon to the ajo del Chamiso, together with the rancho commonly called San Juan, for pasture lands for their animals the frontier being so much exposed that they cannot risk them in any other direction. On the west they have the site known as Cubero, where they have fields under cultivation and an acequia of their own, and they irrigate with the same water that passes through
444 this pueblo; and in the same westerly direction, distant a mile from said pueblo, in the rancho called Santa Ana, where they hold lands for cultivation in common, as far as the alcalde is concerned, who is to reside in this pueblo, he is forbidden by superior orders from availing himself of the labor of the Indians for any

purpose except by paying them the just value of their labor; neither can he compel them to serve on escorts for private individuals unless required by the government to treat upon subjects connected with the royal service.

As far as the officiating minister is concerned, he is placed upon the same terms as the justice, without any authority to tax the pueblo or any Indian with their services excepting a sexton to ring the bell and the feed of a horse, which is to be furnished by the pueblo in case it should be necessary for him to hear a confession. This is the method established by the government for the good government of these pueblos, and having no private malice to accomplish, and at the request of the Indians of the pueblo of Laguna, I leave this statement which I signed on the 25th day of March, 1813.

MANUEL ARAGON.

SANTA FÉ, *August* 28, 1826.

Approved so far as this government is concerned, and legal and formal in its contents.

NARABONA.

Marginal Notes.

This document is to remain in the hands of Don Juan Miguel Casique, and at his death in those of his two daughters, Catrina and Josefa, who have the same right and interest in the site together with Don Vicente Romero, included in the same interest.

[RUBRIC.]

445 The site of Cubero, mentioned in this document, and the water running through it, is the only water these Indians have the use of, as this proceeds from the Gallo spring; therefore if the said spring is settled these poor Indians would perish, as it is the same water that reaches to the pueblo and these Indians are entitled to it, being old settlers in good faith for more than one hundred years.

—— ——. [RUBRIC.]

SURVEYOR GENERAL'S OFFICE,
TRANSLATOR'S DEPARTMENT,
SANTA FÉ, NEW MEXICO, *June* 29, 1859.

The above is a translation of the original on file in this office.

DAVID V. WHITING, *Translator.*

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *August* 25, 1859.

The foregoing is a true copy of the original on file in this office.

WM. PELHAM,
Surveyor General.

Grant No. 2.—Translation.

In this year one thousand eight hundred and twenty, Don Ignatio Sanches Vergara, protector general of the Indians of this province of New Mexico, executed a document alike to the instrument authorized by Don Antonio Sedillo, in the year one thousand seven hundred and sixty-nine; and for not stating three boundaries which said protector did not mention in his document, the parties mentioned in said document requested me to make a copy thereof stating the boundaries to which the rancho of Pagnati is entitled, which document is of the tenor following:

446 For this pueblo of Jemes, on the first day of June, in the year one thousand eight hundred and twenty a document authorized by the former alcalde of the pueblo of Laguna was presented to me by Lorenzo and Alonzo Santiago, Alonzo the second, Torribio and Rita, native Indians of said pueblo, requesting me to take charge of the interests they represented in the rancho called Pagnasti; and having registered it, I find that Don Antonio Sedillo, the said alcalde at that time, took cognizance of a suit brought by Juan Pagnasti and Pascual Pagarito, both residents of said pueblo, and it was ordered that each one should quietly remain upon his own property, without disturbing each other.

Such being the case, and as protector of the Indians for the royal audience of Guadalajara, to whom alone it is proper for the Indians to refer matters of a common or private nature if they are in any way aggrieved, or if they have not a sufficient amount of land with that the law allows them or that they may have legally acquired, and by virtue of the ancient possession of said land to which the said natives refer called the rancho of Pagnasti, acquired by a legal title, and that the new settlement of Ceballeta, granted by Governor Don Fernando Chacon to certain citizens, and possession given by the alcalde Don Jose Manuel Aragon, with the formalities required by the laws of possession and settlement, the boundaries having been marked out. The aforesaid rancho and its boundaries in the direction of Ceballeta remained free with its ancient appurtenances as far as the table-land of El Gabilan, on the south to La

447 Cuesta, on the west to the Rito de San Jose, and on the east to the Canoncito del Cajo.

The new settlers of Ceballeta were satisfied with their boundaries at the table-land of El Gabilan, adjoining the holders in good faith.

The want of land by these Indians is to be taken in consideration, and that the tract of Pagnasti is the only one that in a measure aids them with a scant produce in their misery; and although at the commencement they had more land extending as far as El Rito, they were restricted by Don Joaquin Pino to a tract of waste land, he having deprived them of the said land by virtue of a right to it held by his late father, whom he represents, but which land had been abandoned for more than thirty years. Nevertheless his title was recognized, and they are so much reduced that the only aid

they received is from Pagnasti, where the principal owners cultivate the soil in common with the pueblo, and those who have no lands to cultivate for their support are in a measure relieved.

All of which has been well premeditated and considered, and will be shown whenever an effort is made to injure them by depriving them of the ancient possession of Pagnasti. There is no doubt that, presenting themselves in person or through their protector to the superior audience, they will be allowed to remain in peace, in the enjoyment of what is unquestionably theirs.

In testimony whereof, and in compliance with the duties so repeatedly enjoined upon me by the royal laws of the recopilacion of the Indies, I executed this document for their protection, as protector of the Indians who are so highly recommended to me
448 by the attorney, protector general of the Indians, and for its due authenticity I signed on this said day, month and year.

I signed this as a witness to the truth of the statement made by the protector.

ENSEBIO ARAGON.

SANTA FÉ, *August* 28, 1826.

This document is approved so far as this government is concerned, and according to the merit and formality in which it appears.

NARABONA.

SURVEYOR GENERAL'S OFFICE,
TRANSLATOR'S DEPARTMENT,
SANTA FÉ, NEW MEXICO, *June* 29, 1859.

The above is a translation of the original on file in this office.

DAVID V. WHITING, *Translator.*

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *August* 25, 1859.

The foregoing is a true copy of the original on file in this office.

WM. PELHAM,
Surveyor General.

Conveyance.—Translation.

In the jurisdiction of Laguna, on the 23rd day of the month of August, 1843, before me, citizen Juan Garcia, justice of the peace of said jurisdiction, appeared before me in their proper persons, citizens Don Jose Francisco Chaves y Baca, resident of the jurisdiction of Belen, and Juan Ignasio Chaves, governor of the pueblo of Laguna, and Luis Sarracino, a native of said pueblo, whom I certify are known to me; and the first party stated that, as the agent of his father-in-law, Don Jose Antonio Pino, resident
449 of Sabinal, and for himself, he sold, and in effect did sell, to the parties of the second part, as representatives of the pueblo of Laguna, all the arable lands he owns in the rancho of El Rito, as well as those of the same kind owned by Don Jose Antonio Pino;

also their interest as legal heirs in said rancho for the value and sum of seventy-five sheep, one hundred skins of the standard quality of all classes, and six horned cattle, as follows: two oxes, one cow, two bulls and one heifer; all of which the said representatives promised to deliver to Chaves y Baca as soon as possible to his satisfaction; at which the vendor expressed himself; and does express himself, as satisfied and paid. And if the said lands are or should be worth more, he donates and cedes the remainder to the aforesaid pueblo, to hold them for themselves, their children, heirs and successors, in the free enjoyment of said arable lands, and no suits or litigation shall be commenced against them for said rancho, by themselves, their children, heirs or successors nor those of his father-in-law, as they now and forever renounce all their right and titles to said lands in favor of the purchasers requesting the national justices to whom they may present themselves not to hear them either in court or out of court; and he further stated that he conveyed said arable lands and interests, free from all tax, tribute, or other incumbrance, being the lawful possessor of the same, as the legal heirs of Don Mateo Jose de el Pino, and without injury to the remaining heirs to said rancho, with the only condition that the crops for the present year shall belong to the vendor, the arable lands and interests being from this time the lawful property of the purchasers, for which object he relinquished his
450 rights, as well as those of his clients, in favor of the said pueblo of Laguna, as also his residence and vicinity the vendor retaining no further interest in the Rancho del Rito excepting the houses where the- reside, situate thereupon. And for the fulfillment of this instrument the vendor pledged his personal property now held or in future acquired, with power and authority to the national justices to compel and require the fulfillment thereof in a summary manner, as by judgment, rendered by competent authority in a case duly tried, confessed and not appealed, and on the present common paper, there being none of the proper stamp in this jurisdiction, the parties interested binding themselves to attach it hereto, whenever they procure it. And in order that it may have the force and validity required by law, the said purchaser requested me to interpose my authority and judicial decree; and I, the aforesaid justice, stated that I would, and did interpose it with my attending witnesses, with whom I act by appointment in the absence of a notary public. To all of which I certify on said day, month and year.

JUAN GARCIA.

Attending:
FLORENTINE CASTILLO.
JESUS BEITIN.

SURVEYOR GENERAL'S OFFICE,
TRANSLATOR'S DEPARTMENT,
SANTA FÉ, NEW MEXICO, *June* 29, 1859.

The above is a translation of the original on file in this office.

DAVID V. WHITING,
Translator.

SURVEYOR GENERAL'S OFFICE,
451 SANTA FÉ, NEW MEXICO, *August* 25, 1859.

The foregoing is a true copy of the original on file in this office.

WM. PELHAM,
Surveyor General.

Testimony.

JOSE GONZALES, sworn:

Question. Have you any interest in this case?

Answer. I have none.

Question. How old are you?

Answer. I believe I am forty years of age.

Question. Do you know the rancho called Palmate, adjoining Cebolleta; and how long have you known it?

Answer. I have known it since 1833.

Question. Who possessed it from that time up to the present?

Answer. I am satisfied that it has never been occupied by any others than the Indians of Palmate, who are the same Indians residing at Laguna.

Question. Have the Indians held undisputed and undisturbed possession of it from the time you knew the land?

Answer. The right to it has never been disputed to my knowledge.

Question. Do you know the rancho called "El Rito"?

Answer. I have known it since 1842.

Question. Are the Laguna Indians in possession of that rancho; and for how long?

Answer. I know that they purchased in 1842 from the former settlers and that they have been in possession from that time to this. I
452 was also informed by the old settlers of Cebolleta that the Rito belonged formerly to Laguna, but that the Pinos had usurped their rights; and that the Indians had purchased what was actually their own before.

Question. Do you know the tract of the Gigante cañon; and who have been in possession of it since you have known it?

Answer. I have known it since 1833; but I don't know who owns it. The land is used for pasture by the people of Laguna and Cebolleta.

Question. Do you know the rancho called "San Juan;" and who is in possession of it?

Answer. I have known it since 1833; it has always been in the possession of the Laguna Indians.

Question. Do you know the rancho Santa Ana?

Answer. I have known it since 1842; it is occupied in the whole or in part by the Laguna Indians; I do not know which is the line between the Acoma and Laguna Indians; both are upon the land; when I first knew the rancho the Laguna Indians alone held possession.

Question. Have you lived in the immediate vicinity of the lands since you have known them?

Answer. I have lived at the Cebolleta for five years; and previous to my removing to Cebolleta I lived at Ranchos. I am a Mexican citizen by birth.

The above testimony was taken in the presence of Col. I. L. Collins, superintendent of Indian affairs.

JOSE GONZALES.

Sworn and subscribed before me this 30th day of June, 1859.

WM. PELHAM,
Surveyor General.

JOSE FRANCISCO ARAGON, sworn:

Question. Have you any interest in this case?

453 Answer. I have none; I reside at Cebolleta.

Question. How old are you?

Answer. Forty-nine years old.

Question. Do you know the rancho of Palmate; and who has possession of it?

Answer. I have known it since 1820; the pueblo of Laguna has held undisputed possession up to this time.

Question. Do you know the rancho of El Rito, who has occupied it?

Answer. I have known it since 1820; it was first owned by the Ritenos, and afterwards purchased by the Laguna Indians, who have held undisputed possession from that time to this. I do not know its boundaries.

Question. Do you know the Gigante cañon?

Answer. I do; it is used by the whole neighborhood for pasture ground.

Question. Do you know the rancho of San Juan?

Answer. I have known it since 1820; it has been held by the Laguna Indians since that time; I do not know its boundaries.

Question. Do you know the rancho of Santa Ana?

Answer. I have known it for the same period of time; it has always been occupied by the Laguna Indians.

JOSE FRANCISCO ARAGON.

Sworn and subscribed before me this 30th day of June, 1859.

WM. PELHAM,
Surveyor General.

Rev. SAMUEL GORMAN, sworn:

454 Question. Do you know the rancho of Palmate? If so, state its limits to the best of your knowledge?

Answer. I do. On the north a little mountain called Gabitan; on the east the Cap cañon; on the south the Old spring; the boundary of the pueblo; on the west the Rio San Jose.

Question. What are the boundaries of El Rito?

Answer. I do not know.

SAM. GORMAN.

Sworn and subscribed before me this 30th day of June, 1859.

WM. PELHAM,
Surveyor General.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *August* 28, 1859.

The foregoing is a true copy of the original on file in this office.

WM. PELHAM,
Surveyor General.

Report.

THE PUEBLO OF LAGUNA
vs.
THE UNITED STATES.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *July* 10, 1859.

This case was set for trial on the 30th day of June, 1859.

The Indians of the pueblo of Laguna claim title to certain tracts of land in the vicinity and adjoining the league granted them by order of the King of Spain in 1689. One of these tracts was acquired by grant and purchase, and for the others they claim a possessory title.

Document A, filed by the claimants, is a statement, made
455 at the request of the Indians of Laguna, by Jose Manuel Aragon, chief justice and war captain of the pueblos of Acoma, Laguna, Cebolleta, and its districts, upon his resignation of the above office, which he had held for twenty years, to the effect that he was present during the several visits made by the governors of the province to said pueblo, and that in consequence of the scarcity of lands within their league they were allowed to extend their fields as far as they could plant, for their maintenance. The land which they were allowed to cultivate as above mentioned is known as the rancho of Pagnasti, and purchased by them subsequently from Jose Francisco Chaves y Baca, his own share, and of his father-in-law, Jose Antonio Pino, as will appear by document C; and also states that the Indians occupied the tract known as El Rito, and also the rancho known as San Juan for pasture lands. On the west they also had the rancho of Cabero, which they used in common with the residents of that town; and a mile distant from the pueblo, in a westwardly direction, they also occupied a rancho known as Santa Ana. This document bears date the 25th of March, 1813. On the 28th of August, 1826, it was approved and made legal and formal by Governor Narbona, as will appear by his certificate attached to document A.

Document B purports to be a statement made by Eusebio Aragon to the effect that he was a witness to the establishment of certain boundaries of the Pagnasti rancho, by Ignasio Sanches Virgan, protector of the Indians, in 1820, which boundaries had been omitted in the deed made in 1769. Also that the Indians had been deprived

of the best lands within that tract by Juan Pino as the legal
456 representative of his grandfather, to whom the land had been granted, but which had been abandoned for over thirty years.

This document also bears the confirmation of Governor Narbona, and is declared legal and formal, and bears the same date as the confirmation of document A.

Document C is the conveyance of the interest of Juan Pino in the Pagnasti rancho, to the Indians as above stated.

Evidence has been produced by the claimants to prove their quiet and undisturbed possession of the land, from the year 1820 up to the present time.

The papers acted upon by this office are the originals, filed by the claimants.

In the absence of any conflicting grant or claims to the land claimed by the Indians, the approval of Governor Narabona to the statements made in documents A and B, and their legalization by him, is deemed to be an equivalent to a grant made to said Indians; and although it is not in exact accordance with the usages and customs of the time, it is believed that the Indians have a good and equitable claim to the land, which is sustained by the fact of their having been in the uninterrupted possession of it for the period of forty years, as well as the fact of the boundary of Cebolleta, the site of which was granted in 1800, being the same as the one claimed by the Indians, showing conclusively that their claim was recognized as good by the Government at that time.

The tracts known as the rancho Pagnasti, rancho of El Rito, the tract known as the Gigante cañon, and the rancho of San
457 Juan and Santa Ana, are deemed to be severed from the public domain and are therefore approved to the Indian pueblo of Laguna and ordered to be transmitted to Congress for its action in the premises.

WM. PELHAM,
Surveyor General.

SURVEYOR GENERAL'S OFFICE,
SANTA FÉ, NEW MEXICO, *August* 25, 1859.

The foregoing is a true copy of the original on file in this office.

WM. PELHAM,
Surveyor General.

That after crossing a portion of the grant last referred to, the right of way crosses for two Spanish leagues a grant confirmed by the court of private land claims sitting at Santa Fé, New Mexico, and known as the Laguna pueblo. It crosses this grant from east to west and for a distance of 6½ miles.

That when the right of way was located, and from that time since, it passed around a hill on which the village of Pueblo was, and since has been, located.

That the history of this grant is as follows:

On June 29th, 1857, the pueblo filed a petition in the office of the surveyor general of New Mexico, in which it claimed a grant under

a certain document alleged to have been executed by the governor general of the province in 1689. On November 22nd, 1872, the surveyor general gave a decision recommending the confirmation of the alleged grant, and on November 22nd, 1872, transmitted the papers to the Commissioner of the General Land Office. On January 24th, 1873, the papers so transmitted were sent to Con-
458 gress; but Congress never acted upon the same. Subsequently, in 1896, the same claim was filed in the court of private land claims at Santa Fé, New Mexico, and in September, 1897, the court rendered a decision thereon, a copy of which and the opinion accompanying the same are as follows:

UNITED STATES ET AL.
vs.
PUEBLO OF LAGUNA. } No. 133.

This cause having been at a former day of the present term tried, argued and submitted upon full legal proof and hearing, George Hill Howard, Esq., appearing for the claimants herein, Wm. H. Pope, assistant United States attorney, for the United States, and James H. Purdy, Esq., for the claimants of the El Rito grant No. 136, and the court being now sufficiently advised in the premises, doth make the following findings of facts:

First. That the petition herein has been sustained by satisfactory proofs and that the material allegations thereof are found to be true in the manner and to the extent more fully and particularly set forth and indicated hereinafter.

Second. That the pueblo of Laguna is a body politic and corporate, created and existing under and by virtue of the laws of New Mexico and that said pueblo of Laguna has shown a sufficient interest in the land herein sued for to enable it to maintain this action.

Third. That in or about the year 1699 the ancestors of this complainant established the town and settlement now occupied by the pueblo of Laguna, and that the same has been from the said year
459 1699 up to the present time continuously held, possessed and occupied by the members of the pueblo of Laguna and by their ancestors and that their possession has been during that time open, peaceable and adverse to all the world.

Fourth. That the claim herein made to a tract of land alleged to have been granted and adjudicated to said pueblo of Laguna on the twenty-fifth day of September, A. D. 1689, at the town of Guadalupe del Paso del Rio del Norte by Domingo Jeronza Petroz de Crusate, governor and captain general of the province of New Mexico, and which said tract is described as bounded on the north by the Agua Fria spring called Paguate; to the east the Mesita Colorado, toward the rising of the sun and to the little table-land of Piedras de Amolar; toward the west to the Canada Ancha which empties toward the north when it rains; and to the south to a water which is under a rock, is not sustained by satisfactory proof and the same is hereby rejected.

Fifth. That under and by virtue of a grant from the Spanish

government, the claimant herein became and was at an early date almost if not cotemporaneous with its foundation the possessor and owner of a tract of land consisting of four square leagues in area with the pueblo proper and the middle of the same as the center thereof.

Sixth. That by reason of the grant aforesaid which has been succeeded by continuous and peaceable possession of said four square leagues, the title of the pueblo of Laguna was at the date of the treaty of Guadalupe Hidalgo complete and perfect in and to said four square leagues; and it is hereby ordered, adjudged and decreed
that the same be and it is hereby confirmed to the pueblo of
460 Laguna and its inhabitants and to their heirs, assigns and
successors in interest forever as against the United States of America.

Seventh. The confirmation of this decree is made under law 1, title 2, Book Six of the Recopilacion de las Indias, the royal laws, usages and customs of the Crown of Spain and the laws of nations.

Eighth. That there is by consent of parties excepted from this decree of confirmation and reserved as the property of the United States the following-described lot or parcel of land situate within the limits of the four square leagues herein confirmed, to wit:

That tract or parcel of land beginning at a point 72 feet westwardly from the centre of the main line of the Santa Fe Pacific railroad and 75 feet northwardly from Robert G. Marmon's north fence; thence N. 32 degrees 15 minutes E. on a line parallel to the railroad 21 chains 47 links to the northeast corner, which is a mound of stone; thence N. 57 degrees 45 minutes W. 15 chains to the northwest corner, which is a pile of stone; thence S. 32 degrees 15 minutes 21 chains 47 links to the southwest corner, which is a point; thence S. 57 degrees 45 minutes E. 15 chains to the southeast corner and place of beginning, containing 32.20 acres, more or less.

Ninth. This confirmation shall not pass to the confirmees herein any right or title to any land heretofore sold, or granted by the United States to any other parties, nor any right or title to any gold, silver or quicksilver mines or minerals of the same, situate in
or upon the premises herein confirmed, all of the same re-
461 maining the property of the United States.

Tenth. This tract shall be surveyed as follows: Beginning at a point one league of 5,000 varas north from the center of the front door of the old church in the pueblo of Laguna, running thence due east one league, thence due south two leagues, thence due west two leagues, thence due north two leagues, thence due east one league to the point of beginning.

Oct. 2, 1897.

In the Court of Private Land Claims, Santa Fé, New Mexico, September Term, 1897.

THE PUEBLO OF LAGUNA
vs.
THE UNITED STATES. } No. 133.

The plaintiff is an Indian pueblo incorporated under the laws of the Territory of New Mexico. It seeks by this proceeding the confirmation to it of what is denominated the Laguna Pueblo grant. In its original petition it alleged a grant in 1689 by the governor general of the province and filed a copy and translation of a document which was on file in the office of the surveyor general and which was alleged to be the original grant document. In amendment subsequently filed the claim that the document on file in the surveyor general's office was the original grant document was abandoned, but it was alleged that a grant was in fact made, and that the people of the pueblo have been in open and notorious possession and occupation of the land thereunder for nearly three hundred years.

The answer of the Government is in effect a general denial, and that by an act of Congress approved June 30, 1860, the lands here in question were confirmed to plaintiffs and that this court
462 for that reason does not have jurisdiction of the claim.

Geo. Hill Howard, for plaintiff.
Matt G. Reynolds and William H. Pope, for the United States.

REED, *C. J.*:

We are of the opinion that the act of Congress approved June 30, 1860, is not a confirmation of the claim here alleged by the plaintiff. By that act a list of nineteen private land claims in this Territory which was transmitted to Congress by the Secretary of the Interior on the 30th day of February, 1860, was confirmed. The claims were designated in the list by numbers from 20 to 38 inclusive, that alleged by these plaintiffs being No. 30. The numbers were given to the different cases in the office of the surveyor general of the Territory, and indicate the order in which the cases were disposed of in that office. When we ascertain then what was included in the surveyor general's report No. 30, it is not difficult to determine what was confirmed to plaintiffs by the act, and it is clear from the report that what was recommended for confirmation were the six tracts which were described in the petition which plaintiffs had filed in the surveyor general's office, and which was the basis of his investigation, viz:

1. The rancho called Paguate.
2. The rancho called El Rito.
3. The tract known as the Gigante Cañon.
4. The rancho called San Juan.
5. The site known as Cubero.
6. The rancho called Santa Ana.

The report related alone to those tracts, and it was these that the

surveyor general recommended for confirmation. The report
463 contains neither reference to nor recommendation with reference to the claim here alleged. True the surveyor general in a subsequent report recommended the confirmation of the present, but that report was not before Congress when the act was passed.

II.

The plaintiff offered in evidence two documents which were filed in the office of the surveyor general in 1859, and which are shown to have been in the possession of the pueblo from time immemorial. They purport to have been executed at Guadalupe del Paso del Rio del Norte in 1689. One purports to be a treaty between the governor general and an Indian named Bartolome de Ojeda who was a prisoner of war, and who assumed to act for and represent the various pueblos then in rebellion against the power of Spain in which the governor general stipulated that he would in case the Indians should cease hostilities and again resume their allegiance to the king, make to each pueblo a grant of lands, and the other dated a few days later purports to be a grant to the pueblo of Laguna with boundaries as alleged in the petition. But it was admitted on the trial that the signatures affixed to the instrument are not the genuine signatures of the governor general and his secretary and the papers are in no manner authenticated as copies. It is impossible therefore under the settled rules of the law to admit them in evidence, and with them excluded plaintiff's case stands without original documentary evidence to support the claim of title and it must be determined solely in the light of those rules which the King of Spain had laid down for the government of his representatives in Mexico in their dealings with the
464 Indians, and such references and declarations as may be contained in public documents, and such historicall facts as are in our knowledge. As is pointed out in the opinion of Murray, A. J., in the Cuyamingue case, No. 112 of our docket, at the time the pueblo of Laguna was founded, which was about 1699, a cedula was in force under which they were entitled to a tract of about 839 varas of land. Under other provisions it was made the duty of the viceroy in case that amount was found inadequate for their uses, to give them additional lands. The evidence before us shows that there has been no material increase or decrease of the inhabitants since the pueblo was founded and at present their number is from 1,200 to 1,500. We know also that the village is situated in what is practically a desert, and that but small patches of the land in the vicinity are capable of cultivation. It is therefore certain that the quantity of land above specified was entirely inadequate for the needs of the people. There is a presumption therefore that additional lands were given them. For the very conditions are shown to have existed which under the cedula imposed upon the viceroy the duty of giving additional lands. But that presumption does not enable us to determine the amount or quantity to be given. There are, however, documents in the archives in the surveyor general's office

which throw light upon that subject, and although they were not introduced in evidence in this case, we will take notice of them, for they are themselves historical evidence, and a case of this character must necessarily depend to a large extent upon evidence of that character. There is the record of a proceeding in 1815 before Maynes, the then governor general of
465 the province between the pueblo of Taos and certain persons who it was alleged were occupying lands belonging to the pueblo. In the proceedings the governor undertook to adjudicate the extent of the rights of the pueblo. He declared, and made it a matter of record, that the King had given to each pueblo four square leagues of land measuring from the center of the village; that the land was given in entail and that the Indians were incapable of alienating, and he adjudged that those who occupied lands within the grant of Taos even though they entered originally with the consent of the Indians, were there without right. We are warranted in accepting that statement, and we do accept it as the best attainable evidence as to the extent of the right of these plaintiffs. It is true that in documents executed in 1826 by the protector general of the Indians at Laguna these lands are spoken of as the "league" granted them by the King. Taken literally that language would seem to indicate that they had but one league. But it is not to be so taken. We know that by common usage the word league when used with reference to the lands of a pueblo designate the tract, rather than the quantity of land. It is used frequently in the record above referred to and always in that sense, and we know that it is so used in many cases, and we have no doubt that it was used in that sense in the documents in question.

A decree will therefore be entered confirming to the plaintiffs four square leagues to be measured from the center of their village.

Subsequently the survey of the grant as confirmed by the
466 court was made, and on August 22nd, 1899, was approved by the court.

That the facts stated in the opinion of that court confirming this grant, are substantially correct.

That in the claim filed in the surveyor general's office on June 29th, 1857, the west line claimed by the Indians of the grant to their pueblo was about two Spanish leagues farther to the west than the west line fixed by the court.

That from the west line of the pueblo, as fixed by the court, the right of way passes over about two Spanish leagues of public land and then again crosses from east to west the lands heretofore referred to as the Laguna Indian Pueblo tracts.

That the general characteristics of the country crossed by the right of way in passing from the east line of the Laguna Indian Pueblo tracts to the final west line of the same tracts is the same as heretofore described, with the exception that in several places small portions of land included within each of the grants last referred to as crossed by the right of way, were long prior to the location of said line, and ever since said date have been cultivated, though not inclosed, by the Indians of Laguna.

That the officers and agents of the railroad company and the receiver had no other or further knowledge concerning these last-named grants than they had concerning any of the other grants herein referred to, except such as would be derived from the settlement and cultivation of these grants by these Pueblo Indians, as stated, and that no segregation except as herein stated, of the lands of this grant from the remainder of the public domain was ever made until the decision of the court referred to, and until that decision, it would have been impossible to have located the
467 same.

That the right of way, after crossing the west line of the last Indian Pueblo tracts, crosses over lands contained in the Spanish grant known as the Acoma pueblo; that the land over which the right of way crosses in this grant is of the same general character as those contained in the other grants; that the Indian pueblo of this grant is out of sight from any point on the right of way; that there was some small acreage cultivated by the Indians, but not enclosed, over which the right of way was located. The right of way over this grant is 12¼ miles in length.

That an application for this grant was filed in the office of the surveyor general of New Mexico, March 3, 1856, and that the application, with the recommendation of the surveyor general was transmitted to the Commissioner of the General Land Office, September 30th, 1856, and was confirmed by Congress by act of December 22nd, 1858.

That the grant papers accompanying the application to the surveyor general, and presented to Congress, are as follows:

At the town of Our Lady of Guadalupe of El Paso del Rio del Norte, on the twenty-eighth day of the month of September, one thousand six hundred and eighty-nine, His Excellency, Domingo Jironza Petroz de Crusate, governor and captain general declared that whereas on reaching, in New Mexico, the Quitares nations and the apostates of that kingdom (veine) as also the Queres and the pueblos, ordered that the boundaries to where the Indians of the pueblo of Acoma were entitled be ascertained with great perspicuity
which Indians distinguished themselves at the time of the
468 insurrection, and communicated with all the other pueblos of that kingdom, and first with that of Zia and with that of Moqui and with that of Zuni, which are of the Queros tribe, at war with all the other pueblos, all of which being ascertained on this visit to this pueblo of Acoma, in the province of New Mexico, at the request and supplication made to me by an Indian named Bartolome de Ojeda, who finding himself wounded with a ball and dart, and who is an intelligent Indian, knowing how to read and write, and one who exercised power among all the Indians, principally among the apostates, he being obeyed by all the pueblos of that kingdom, and seeing himself disabled and his oath already taken, and not hoping to survive, having confessed and been examined by Baminguez Mendoza, chaplain of the army, thus under oath declared that he was a native of the pueblo of Zia, province of New Mexico, that his age is twenty-one or twenty-two years, a little more

or less, that he has had no other occupation than that of the use of arms, and that he knows the situation of the pueblo of Acoma.

Interrogated how the pueblo of Acoma is situated and what are its boundaries and whether those Indians participated in the revolution at the time of the insurrection, the deponent answers that they did not, but that having fully taken warning from what had befallen the pueblo of Zia last year, he judged they would not again revolutionize, and that its boundaries were on the north the Prieto mountains; that the Gallo spring was on the west, and that this spring belonged to Acoma, that the old pueblo stood opposite the Cubero mountains, and the Penol was on the southern side, that these all belonged to Acoma, and that the pueblo of Laguna
469 planted itself adjacent to Acoma, but only to receive the surplus of water left by the Acoma Indians. Thus declared the deponent and he deposed under oath, and I ordered to be granted accordingly as deposed by the Indian to the extent of my power and I do proclaim the same, causing the deponent to sign, with said governor and captain general before me, the undersigned officer, to which I certify.

BARTOLOME DE OJEDA.
DOMINGO JIRONZA PETROZ DE CRUSATE.

Before me—

PEDRO LADRON DE GUIVARRA,
Secretary of Government and War.

(Note on paper in lead pencil "Sept. 30, 1863.")

1689.—In the town of Our Lady of Guadalupe del Paso del Rio del Norte, on the twentieth day of the month of September in the year one thousand six hundred and eighty-nine, His Excellency Don Domingo Jironza Petroz de Crusate, governor and captain general, stated that whereas in the overtaking which was had in the pueblo of Acoma, and the power he has over the Queres Indians and over the apostates in New Mexico, he provided that an Indian named Bartolome, who was the most conspicuous in the battles, lending his aid everywhere, and surrendered, being wounded by a ball and an arrow, and being already crippled, I ordered him to state the truth, and declare in his confession the condition of the pueblo of Acoma and that of the other apostates in that kingdom, and as the Indian is well versed (ladino) in the Spanish language, and intelligent, and can read and write, and was examined
470 before General Don Pedro Venero de Passada, who had returned from New Mexico, and had been at the pueblo of Acoma, and the militia officer Bamingues Mendoza, was also called, in order that the Indian Bartolome should below state what his name is.

Interrogated—if he is disposed to confess the truth in what he knew and might be asked, and interrogated what is his name, where he is a native of, his age, and what his occupation is, and if he knows the condition of Acoma and Laguna, who are neighbors; and he answered his name was Bartolome de Ojeda, and that

he is a native of the pueblo of Zia, in the province of New Mexico; that he is twenty one or two years of age, more or less; that he has had no other occupation than that of a warrior, and that he knows the condition of Acoma and Laguna, because he was an apostate in the province of New Mexico; and this is his answer.

Interrogated—how was it that Laguna and Acoma, being such neighbors, they disagreed so much, and how was it that they had moved to El Penol, and being such arrogant Indians, why had they left their pueblo; and he answered that the Acomas had moved to El Penol, being such arrogant Indians, and he answered that the Acomas had moved to El Penol on account of the many wars between one pueblo and the other; and this is his answer.

Interrogated—what was the cause of these pueblos living near each other, and what agreement was there between them, and why did they disagree; and the deponent answered that Laguna moved near Acoma on account of the abundance of water there was in that pueblo, but always for the purpose of collecting the surplus remaining from the pueblo of Acoma; and this is his answer.

471 Interrogated—what are the existing boundaries of Acoma, and to how much is each pueblo restricted; and the deponent answered that the Prieto mountain is to the north, and that the Gallo spring is to the west, and that the Cubero mountain is opposite the old pueblo of Acoma, and that the Penol is on the south side; and that when the Indian Pocpec visited the pueblos he ratified the above, as he is an Indian of the Tequa tribe and a native of the pueblo of San Juan, who was obeyed by all the land at the time of the insurrection, and who was in company with Alonzo Gatiti; and Don Luis Tapabir and several other captains of those pueblos had affirmed that the water belonged to the pueblo of Acoma, and that Laguna was to collect the surplus remaining from the pueblo; and this is his answer.

Interrogated—if he knows more than what he has stated, and if Laguna has any other defence to make concerning the water, and he answered that he had not; that although the pueblo had removed to El Penol it had not lost its right to the water, and that the Laguna Indians were not ignorant of the fact, as it is notorious; and that what he has stated is the truth under the oath which he has taken, which he affirms and ratifies, this grant being read and explained to him he signed it with his excellency the governor and captain general aforesaid, before me, the present secretary of government and war to which I certify.

DOMINGO JIRONZA PETROZ DE CRUSATE.
BARTOLOME DE OJEDA.

Before me—

DON PEDRO LADRON DE GUIVARRO,
Secretary of Government and War.

472 That the survey of this pueblo was made in March, 1877, and June 5th, 1877, it was approved, and November 19th, 1877, a patent was issued.

That none of the officers or agents of the railroad company, or

the receiver, ever had any further or other information concerning the boundary lines of this grant than they had of any other of the grants referred to, except the further fact that they had knowledge that there was some cultivation by the Indians, and also of the existence of the pueblo village. That until this survey was made no one could have located the exterior lines of this grant accurately.

That a blue print marked "Exhibit 2" may be filed in this case, to be considered herewith by this and the courts to which the case may go, as practically showing the route of the right of way of the railroad company through Valencia county, and the exterior lines of the different grants, so far as the same can be determined without actual survey, except that the lines of the pueblo of Laguna are too large, and that the red lines enclosing the space to represent two leagues square is the extent of that grant, and except that the Joaquin Sedillo and Antonio Gutierres grants are of the width herein stated. The facts stated on the blue print with reference to each grant are practically correct.

That in due time in the year 1892, the Atlantic & Pacific Railroad Company made a return for assessment to the assessor of Valencia county, which was intended to show all of the property of the said railroad company subject to assessment and taxation in that county. A true and correct copy of this return is at-
473 tached to the plea filed herein as Exhibit 1, which by reference thereto is made a part of this agreed statement of facts. That subsequently, the assessor of Valencia county for the year 1892 in due time made an assessment of certain property of the Atlantic & Pacific Railroad Company in that county, a true copy of the assessment-rolls for that year, as far as it shows the action of the assessor in assessing the property of the said railroad company, is shown by Exhibit 2 attached to said plea filed herein, and which by reference thereto is made a part hereof. That in due time subsequent proceedings were had by the authorities in said county, relative to the levying of taxes against the assessed property of the said railroad company, which are accurately shown by Exhibit 3 attached to said plea filed herein, which by reference is made a part hereof. That at the proper time in the year 1893 the assessor and other taxing officers in Valencia county for that year assessed certain property of the Atlantic & Pacific Railroad Company for taxes, and extended a levy of taxes on the books of said county against such assessment. That Exhibit 7 attached to said plea correctly shows the proceedings had relative to the assessment and taxation of the property of the Atlantic & Pacific Railroad Company in Valencia county, New Mexico, during the year 1893, and which by reference thereto is made a part hereof. That on July 6, 1893, the board of county commissioners of said county made and entered on its journal an order concerning the levying of taxes for that year, of which the following is a true and correct copy:

It is ordered by the board that the levies of taxation for the year A. D. 1893 be, and the same hereby are fixed as follows, to wit, and
474 the assessor of the county is hereby ordered to make his books of taxation in the manner provided by law and to ex-

tend and levy the taxes against the valuations as finally fixed and determined by the board of equalization of the county for the year 1893, according to the rates fixed by this order, to wit: For general county purposes two and one-half mills on each dollar of valuation; additional levy for general purposes of the county as provided by section two, chapter 68, Laws of 1889, one-half mill on each dollar of valuation; to pay court costs five mills on each dollar of valuation; for interest on funded debt of 1882 and 1883, .00225 mills; for funded bonds, 1882 and 1883, .003 mills; interest on funded debt of 1885, .0032 mills; interest on funded debt of 1899, .0045 mills; interest on current expense bonds, .0006 mills; road and bridge fund, .0005 mills; unpaid interest on funded debt, .0025 mills; for territorial taxes as directed by territorial auditor, viz: For territorial purposes (sec. —, chap. 61, Laws of 1893), 6 mills on the dollar; for special deficit, 44th fiscal year (sec. 4, chap. 61, Laws 1893), 2.25 mills; for normal school, Silver City and Las Vegas, (sec. 9, chap. 33, Laws 1893) $\frac{40}{100}$ mills on the dollar; for normal institute (sec. 4, chap. 50, Laws 1893) $\frac{5}{100}$ mills on the dollar; for branch agricultural experiment station (sec. 5, chap. 53, Laws 1893) $\frac{25}{100}$ mills on the dollar; for casual deficit bonds interest (sec. 7, chap. 61, Laws 1893), $\frac{25}{100}$ mills on the dollar; for territorial institutions (sec. 24, chap. 61, Laws 1893) 1.75 mills on the dollar; for cattle indemnity fund as provided by law one-half mill on the dollar; public schools, 2 mills on the dollar.

475 That in January, 1894, the Mercantile Trust Company of New York filed a bill in this court against the Atlantic & Pacific Railroad Company to foreclose a second mortgage on all the property of said railroad company at and west of Albuquerque, N. M. That at the time of the filing of the said bill, the court appointed three receivers to take possession of the property of the said railroad company, and that in January, 1894, upon their appointment these receivers qualified and took possession and custody under the order appointing them, of all the property of the said railroad company, which was subsequently delivered into the possession and custody of C. W. Smith, as receiver. That these receivers continued in the possession of said property under the order of this court until February 1st, 1896, when they delivered the same to C. W. Smith, pursuant to the order made in this cause appointing the said C. W. Smith, receiver herein. That the said action commenced by the said Mercantile Trust Company has never been finally determined and disposed of, but all the property sought to be foreclosed in that action, by that bill was sold under the decree made in this cause. That Solomon Luna was from the fall of 1892 to 1898 inclusive, the sheriff and *ex officio* tax collector of Valencia county; that in June, 1894, the said Solomon Luna, as such collector of taxes for said county filed an intervening petition in the cause wherein The Mercantile Trust Company was complainant, to recover taxes alleged to be due upon an assessment and levy of taxes of and against certain property of the said Atlantic & Pacific Railroad Company in Valencia county, and in December, 1894, the said Solomon Luna, as such col-

lector, filed an amended intervening petition in said cause; that
476 Exhibits 4 and 5 attached to the plea herein shows true and correct copies of the said intervening petition and the amended intervening petition filed in the Mercantile Trust Company case, and by reference to said exhibits they are made a part hereof. That subsequently, and in due time, the receivers in that case filed their several pleas to said amended intervening petition, and these pleas were set down for argument; that nothing further has ever been done by this court concerning said amended intervening petition and the pleas therein. That in the year 1894, the assessor and other taxing officers of Valencia county, at the proper time, made an assessment of certain property of the said railroad company and extended a levy of taxes thereon against such assessment. That Exhibit 9 attached to said plea is a true and correct copy of the proceedings had in such year relative to the assessment and taxation of the property of the Atlantic & Pacific Railroad Company in said county, for and during the year 1894, except that the oath of the assessor attached to the assessment-roll for that year is omitted, and except that an entry was made on the journal of said commissioners of said board on the 2d day of July, 1894, of which the following is a copy:

It is ordered by the board that the levies for taxes for the year A. D. 1894, be and the same are hereby fixed as follows, to wit: and the assessor of the county is hereby ordered to make the tax books in the manner provided by law and to extend and levy the taxes against the valuation as finally fixed and determined by the board of equalization of the county for the year 1894 according to
477 the rates fixed by this order, to wit:

For general purposes of the county two and one-half mills on each dollar of valuation. Additional levy for general county purposes as provided by sec. 2, chapter 68, Laws of 1889, one-half mill on each dollar of valuation. To pay the expenses of the court, six mills on each dollar of valuation. To pay interest on funded debts of 1882 and 1883, .00225 mills. For funded bonds 1882 and 1883, .003 mills. Interest on funded debt of 1885, .003 mills. Interest on funded debt 1889, .005 mills. Interest on current expense bonds, .001 mill. Road and bridge fund, .0005 mills. Unpaid interest of funded debt, .0025 mills.

For territorial taxes as directed by the order of the territorial auditor, viz:

For territorial purposes (sec. 3, chap. 61, Laws 1893), 6 mills on the dollar. For casual deficit bond interest (sec. 7, chap. 61 Laws 1893), $\frac{2.5}{100}$ of one mill on the dollar. For territorial institutions (sec. 24, chap. 61, Laws 1893), 1.50 of one mill on the dollar. For cattle indemnity fund as provided by sec. 23, chap. 106, Laws 1889. Public schools two mills on the dollar.

The district court of the second judicial district of the Territory of New Mexico by the Hon. Judge N. C. Collier having, "on the fourth day of October, 1894, issued an 'order of mandamus' directed to the board of commissioners of the county of Valencia, N. M., therefore, be it resolved by the board of commissioners in and

for the county of Valencia that whereas the assessment books for the year 1894 presented at the last meeting of said board have been approved and whereas at a later date, to wit, on the 4th day
478 of October, 1894, an order 'mandamus' was issued by the Hon. Judge N. C. Collier, judge of the supreme court and judge of the second judicial district court, the said order directing the commissioners to cause an additional levy to be made on the assessment books of the county of Valencia, the said levy to be ¾ of one mill on all taxable property in said county for the purpose of satisfying a certain judgment rendered by the second judicial district court against the county of Valencia and in favor of Michaelis Fischer in the sum of two thousand twenty and $\frac{77}{100}$ dollars ($2,020.77) therefore it is ordered by the commissioners of the county that an order issue to the assessor of the county to correct his books in such manner that the said order 'mandamus' above noted may be satisfied and therefore the said levy of ¾ of one mill on all taxable property is hereby ordered."

That at the proper time in the year 1895, the proper officers in Valencia county duly assessed certain property of the Atlantic & Pacific Railroad Company in said county, and extended the taxes levied for that year against such assessment; that Exhibit 11 shows the assessment made, and the taxes levied against the same, and the order of the commissioners entered on the assessment-roll for the year 1895, so far as it affects the property of the Atlantic & Pacific Railroad Company, and by reference to said exhibit, it is made a part hereof, the oath of the assessor being omitted from said exhibit. That on the 3d day of September, 1895, the county commissioners of said county made an entry on their journal, of which the following is a copy:

Now the commissioners resolved and ordered that the fol-
479 lowing rate of taxes be fixed on the taxable property of the county of Valencia for the year 1895, and that the same be duly entered on the assessment-roll of said county for said year, to wit: For territorial purposes, six (6) mills on the dollar; for territorial institutions $\frac{75}{100}$ mills on the dollar; for cattle indemnity fund as provided by sec. 23, chapter 106, Laws of 1889, ½ mill on the dollar; for schools 2.50 of one mill on each dollar; for general county fund 2½ mills on each dollar; for additional fund ½ mill on each dollar; for court fund 3 mills on each dollar; for interest fund 1882 and 1883, 2 mills on each dollar; for reserve fund, *id* 3 mills on each dollar; for interest fund 1885, 3 mills on each dollar; for interest fund 1889, 4 mills on each dollar; for current expense fund, 1 mill on each dollar; for interest fund 1895, 2 mills on each dollar; for judgment fund 3 mills on each dollar; for roads and bridges fund ½ mill on each dollar; for unpaid interest, 2 mills on each dollar.

That in the year 1896, at the proper time, the proper officers in said county assessed certain property of the Atlantic & Pacific Railroad Company in said county, and extended taxes levied that year against said assessment. That Exhibit 13 attached to the plea herein correctly shows the proceedings, assessment and levy of

taxes made in that county that year, in so far as the same affect the property of the Atlantic & Pacific Railroad Company, except that the oath of the assessor is omitted, and by reference hereto, said exhibit is made a part hereof; that the said board of county commissioners of that county on the 24th day of August, 1896, made and entered on its journal an order of which the following is a correct copy:

480 Now the commissioners resolve and order that the following rate of taxes be fixed on the taxable property of the county of Valencia for the year 1896, and that the same be duly entered upon the assessment-lists of said county for said year, to wit:

For territorial purposes, six (6) mills on the dollar; for territorial institutions one and $\frac{3}{4}$ ($1\frac{3}{4}$) mills on the dollar; for cattle indemnity fund, one-half ($\frac{1}{2}$) mill on the dollar; for schools, two and one-half ($2\frac{1}{2}$) mills on the dollar; for general county fund, two and one-half ($2\frac{1}{2}$) mills on the dollar; for county additional fund one-half ($\frac{1}{2}$) mill on the dollar; for court fund four (4) mills on the dollar; for interest fund 1882 and 1883 two (2) mills on the dollar; sinking fund 1882 three (3) mills on the dollar; for interest fund 1885 one (1) mill on the dollar; for interest fund 1889, four (4) mills on the dollar; for current expense fund one (1) mill on the dollar; for interest fund 1895 two (2) mills on the dollar; for judgment fund six (6) mills on the dollar; for roads and bridges one-half ($\frac{1}{2}$) mill on the dollar; for unpaid interest fund two (2) mills on the dollar.

That after the year 1892 no return was ever made by the Atlantic & Pacific Railroad Company or its receivers to the assessor of said county of the property claimed in the return made in 1892, as shown by Exhibit 1 attached to said plea, which was in said return claimed to be exempt. That in each year from 1892 to 1896, inclusive, the railroad company, or its receivers, duly paid all taxes levied in each year against its property as shown by the exhibits hereinabove made a part hereof by reference, except and save only the taxes levied upon the assessment made in each year by the assessor of the

481 right of way and station grounds of said railroad company in said county; that no objection was ever made by the railroad company, or its receivers, having charge of its property under the order of this court, to the form or description of the property assessed in each of said years by the assessor of said county, as shown by exhibits made a part hereof by reference thereto, except as appears from the pleas to the amended intervening petition of Solomon Luna as hereinbefore referred to. That in each of the years referred to the said railroad company, or its receivers, claimed that the right of way of said railroad company in its entirety, including its station grounds, was exempt from taxation under the act of incorporation approved July 27, 1866. That on June 7, 1897, the said Solomon Luna, as collector of taxes for said county, having in his possession the tax-lists for 1896, entered upon a blank page of said tax-lists certain entries which are correctly shown by Exhibits 6, 8, 10, 12 and 14. That he attached to each of said blank pages at and upon the portion thereof where the description of property and name of owners usually appears and opposite each entry of the extension of

taxes, a typewritten page, headed "Additional assessment," etc., which are fully shown by the exhibits last referred to and which are attached to the plea filed herein and by reference to each one of these exhibits last named, 6, 8, 10, 12 and 14, the same and each one are made a part hereof, and these proceedings by the said Solomon Luna which are shown by the exhibits referred to show the assessments and taxes claimed herein by the intervening petitioner. That
on June 7, 1897, the county assessor of said county had in his
482 possession the assessment-rolls of said county for the year
1897 but they were not then completed and were completed, verified and turned over by the assessor on the 6th of September, 1897. That the assessment so made by Solomon Luna on June 7, 1897, upon the tax-lists of 1896, were never presented to nor approved by the board of county commissioners of said county.

That no appeal was ever taken for or on behalf of the Atlantic & Pacific Railroad Company, or its receivers, or the United States Trust Company of New York, from the assessment made by the county assessor of said county during the years 1892 to 1896 inclusive, as herein shown, against the property of the Atlantic & Pacific Railroad Company to the board of county commissioners of said county, or the county board of equalization of said county, or to the territorial board of equalization. That no appeal was ever taken by any one from the assessment made by the said Solomon Luna on June 7, 1897, of certain property of the said railroad company for the years 1892 to 1896 inclusive, as herein shown. That to save the time and expense of taking testimony, it is admitted that the following persons would testify as follows, and that such testimony may be taken and considered by the court as fully as though the parties had so testified before a special master, or the court.

Solomon Luna would testify that at the time of making the said assessment on the tax-rolls of 1896, by him as collector, on the 7th day of June, 1897, and on that date and after making such assessment that he then to the best of his recollection, under instructions
from Mr. F. W. Clancy, prepared a notice of the fact that he
483 had made such assessment, and mailed to their addresses a
copy of such notice to C. W. Smith, receiver, and to the local solicitor of the United States Trust Company of New York, Mr. Neill B. Field, and to Mr. C. N. Sterry, solicitor for the receiver. That while he has no positive recollection about the matter, he was instructed at this time by Mr. Clancy to do this, and to the best of his recollection he did it.

C. N. Sterry would testify as follows: That he has no recollection of ever having received any such notice. That he had under the receiver charge of all tax matters pertaining to the property in the hands of the receiver; that if he received any such notice, it was placed by him, or his assistant, Karl A. Snyder, Esq., with the files in his office, pertaining to Valencia County tax matters.

Karl A. Snyder would testify that he has no recollection of ever seeing or receiving such notice, but that if he had, he placed the same in the files in the office of C. N. Sterry, Esq., (whose assistant he was) pertaining to Valencia County tax matters.

C. W. Smith would testify that he had no recollection of ever receiving any such notice, but that if he did receive the same, he turned it over at once to C. N. Sterry, his solicitor having charge of all tax matters.

C. N. Sterry would further testify that he turned over all the papers relating to tax matters of the Atlantic & Pacific Railroad Company in the fall of 1897 to Godfrey Holterhoff, Jr., at Los Angeles, Cal.

Godfrey Holterhoff, Jr., would testify that he turned over all papers relating to tax matters of the Atlantic & Pacific Railroad Company received from C. N. Sterry, to A. P. McGinnis, the
484 tax agent of the Santa Fe Pacific Railroad Company.

A. P. Maginnis would testify that at the request of Mr. Sterry he made diligent and careful search in all the places within his knowledge where any such papers should be, and of every paper connected with the tax matters and tax papers pertaining to taxes in Valencia county, New Mexico, levied against the Atlantic & Pacific Railroad Company, its property, or its receivers, or both, and that while he found many papers pertaining to such files, he did not find any notice given by Solomon Luna as collector, or otherwise, of the fact that he, the said Solomon Luna as such collector, had on the 7th day of June, 1897, or at any other time made what he called an additional assessment against the property of the Atlantic & Pacific Railroad Company for the years 1892 to 1896 inclusive. This constitutes all the evidence upon the question as to whether or not Solomon Luna gave any notice of the action taken by him on June 7, 1897, relative to the assessment of the property of the Atlantic & Pacific Railroad Company by him as such collector.

On June 22d, 1897, the purchasers of the property sold under the decree of foreclosure entered in this couse, conveyed to the Santa Fe Pacific Railroad Company, a corporation created under the act of Congress approved March 3, 1897, all of the property purchased by them at the sale under such decree of foreclosure, and which was conveyed to them by O. N. Marron, special master, on June 2, 1897. That on and subsequent to July 1, 1897, the Santa Fe Pacific Railroad Company was, and has been, in the actual possession, ownership, control and operation of the line of railroad formerly known as the
485 Western division of the Atlantic & Pacific Railroad Company which was sold under said decree of foreclosure in this cause as stated. That the Santa Fe Pacific Railroad Company has never been made a party hereto, and has never entered its appearance in this cause, unless the terms of the order of confirmation of the foreclosure sale makes it a party, or unless it is a party by reason of the fact that on the 19th day of December, 1898, it filed a petition in this cause asking for an order to the clerk of this court to publish a notice to the creditors which was authorized to be published by the receiver under the terms of the decree of foreclosure and the decree of confirmation herein. That all of the property of the Atlantic & Pacific Railroad Company against which any assessment mentioned in the intervening petition herein was made, was sold under the decree of foreclosure entered in this cause on May 3, 1897, and such

sale was confirmed on May 4, 1897, and a conveyance thereof made by the said special master as provided for in such decree so made to the purchasers at said sale. That the said purchasers at said sale, Aldace F. Walker, Victor Morawetz and R. Sommers Hayes were never made parties to this action and that no notice of the action of the said Solomon Luna in attempting to make an additional assessment on June 7, 1897, for the years 1892 to 1896 inclusive, of certain property of the said railroad company as stated, was ever given to said purchasers or either of them, or to the Santa Fe Pacific Railroad Company, save and except such notice as might be considered as given by the filing of the intervening petition herein.

That at the time of the filing of the plea filed herein by the
486 United States Trust Company of New York, and C. W. Smith, neither C. N. Sterry, nor Karl A. Snyder, had any actual knowledge of, or concerning any of the Spanish grants referred to herein, save and except only that on the maps published by the Interior Department from 1876 to that date there had been projected from time to time certain claimed Spanish grants, and that in admitting in said plea that there *was* 58 miles of right of way acquired over lands held in private ownership by the railroad company in the pleas filed June 22, 1897, the admission was made without actual knowledge other than that obtained by scaling the grants as they severally appeared upon the United States maps, and the line of the road as it appeared to cross over the same. Neither the said Sterry nor Snyder at the time knew anything of the actual history or condition of any of these grants.

That at the time of the confirmation of the sale under the decree of foreclosure, F. W. Clancy had been retained to collect any back taxes that might be due upon the property of the railroad company in Valencia county for any of the years referred to, and that at that time he stated to the court in the presence and hearing of the purchasers that he did not wish such purchasers to afterwards say that they had purchased said property without notice of the fact that there were claims for taxes in the two counties of New Mexico through which said railroad ran, covering a series of years, which were to be enforced, if possible, as a lien upon the property of said railroad company, one of which claims, that for the county of Bernalillo, had already been disposed of adversely to the county in the supreme court of New Mexico, and was then standing upon appeal taken
487 by the Territory to the Supreme Court of the United States.

That during the years 1892 to 1897, inclusive, there were two broad-*guage* railroads running through the county of Valencia, one of which was the Atlantic & Pacific railroad, and the other that of the New Mexico and Southern Pacific Railroad Company, the last-named road being leased and operated by the Atchison, Topeka & Santa Fe Railroad Company of Kansas as a part of its through line from Chicago to El Paso, Texas. That there *was* of the last-named railroad 22.55 miles of main track, and $\frac{74}{100}$ miles of side track in said county. That its right of way was of the same width as that of the Atlantic & Pacific Railroad Company, and that there were two stations in said county upon said railroad. That to save time and expense of taking testi-

mony as to the actual valuation of the railroad property of the Atlantic & Pacific Railroad Company in Valencia county during the years referred to, it is admitted that R. B. Burns, of Williams, Arizona, would, if sworn, testify as follows, and that such testimony may be considered by the court to the same extent it would be considered if the witness gave the same under oath before the court, or a special master:

My name is R. B. Burns; am a civil engineer, residing at Williams, Arizona; that I was chief engineer of the Atlantic & Pacific Railroad Company, and for its receivers during all the time from January 1st, 1892, to January 1st, 1897, inclusive. I was during all these years perfectly familiar with the line of railroad of the Atlantic & Pacific Railroad Company through Valencia county, New Mexico, and of its physical condition and its value. That during
488 each of said years the fair actual cash value of the right of way of said railroad company in said county, including the right of way itself, and the entire permanent structure placed thereon to make a complete railroad, also bridges, buildings, switches, telegraph line, was not to exceed $604,511. This amount I believe to be its fair, actual cash value at that time.

It is further agreed that Solomon Luna would testify that during the years stated he was sheriff and *ex officio* collector of Valencia county; that he was familiar with the method and mode of valuing property during these years by the county assessors for the purposes of taxation, and that during the years referred to the assessor in each year attempted to assess the property placed upon the tax-rolls at what was thought to be fifty per cent. of its fair, actual cash value, and that it was the general understanding in that county that the property assessed each year by the assessor in said county was upon that basis, except as hereinafter stated.

That the claim for taxes sought to be recovered by the intervening petition herein, was never at any time presented for payment to the purchasers under said decree of foreclosure, or to the Santa Fe Pacific Railroad Company, the assignee of the said purchasers, by any one, and payment thereof was never demanded from said purchasers, or their assignee, by any one at any time save and except as herein stated, and save and except also, as the filing of the intervening petition herein may be deemed or considered to have been such presentation or demand. That the said F. W. Clancy, Esq., entered
489 into a written contract with Valencia county for the collection of the taxes in controversy by proceedings in court on June 7th, 1897, and that this contract included authority to commence suits, as well as authority to prosecute any suit or claim at that time pending by said F. W. Clancy as counsel or attorney for said county. That no formal authority was ever given said F. W. Clancy by the solicitor general or any other officer of the Territory of New Mexico having authority to do so, to use the name of the said Territory in the filing of the intervening petition herein, but that subsequently upon an appeal being taken from the decision of the district court in dismissing said intervening petition, the then solicitor general of New Mexico filed in the supreme court of the

Territory an assignment of errors to said appeal, in addition to the one filed by the said F. W. Clancy, and approved in other ways the proceedings taken by the said F. W. Clancy to perfect such appeal, and, also, the appeal from the supreme court of the Territory to the Supreme Court of the United States.

That at the time Solomon Luna, on the 7th day of June, 1897, made the additional assessment shown by Exhibits 6, 8, 10, 12 and 14, he had no knowledge of the actual extent which the right of way of the Atlantic & Pacific Railroad Company occupied in crossing the lands covered by the several Spanish grants hereinbefore referred to, not having an accurate description of all of such grants; that in placing upon said tax-rolls these additional assessments, he estimated from the best information he could obtain that there *was* 60.7 miles of the right of way of said railroad company located upon lands which were held in private ownership under certain Spanish grants at the time of the location of said right of way through
490 said county, and that this 60.7 miles was located upon land held in private ownership because of the fact that it apparently crossed for that distance to the best of Luna's judgment the Spanish grants referred to hereinabove, except that at the time the said Luna believed that the north line of the San Clemente grant extended to the north line of the Joaquin Sedillo grant, so that the San Clemente grant took in both the Joaquin Sedillo and the Antonio Gutierrez grants and that the statement in the tax-rolls that this additional assessment was levied on 60.7 miles of land held in private ownership was based solely upon the knowledge of these grants (except the last-named two) of their claimed boundaries, and of the fact that the line of the right of way was located upon lands within the claimed boundaries to that extent as he thought.

That during the years referred to the right of way and superstructure thereon of the New Mexico and Southern Pacific Railroad Company through Valencia county was of greater value per mile than was that belonging to the Atlantic & Pacific Railroad Company. That the entire length of the right of way of said railroad company in controversy in Valencia county is 93.7 miles, and that no part of it was ever acquired by purchase or condemnation proceedings and that the only claim of the Territory to the fact that any portion of it runs over lands held in private ownership is based entirely upon the fact that on account of the Spanish grants referred to the line over the lands in each one of these grants is claimed by the Territory to run over lands held in private ownership as stated in the allegations in the intervening petition.

491 That no compensation was ever paid by the Atlantic & Pacific Railroad Company for any of its right of way in Valencia county to any person or persons, and none was ever asked or demanded from it by any one. That no objection was ever made by any one to the location, use and occupation of any portion of its right of way over any Spanish grant in Valencia county. That the judgment fund for which taxes were levied by the county commissioners of Valencia county for the years 1895 and 1896 was created and taxes levied therefor for the purposes of obtaining funds in ad-

dition to the other funds in said county with which to pay several outstanding judgments which had been rendered in favor of various persons against said county prior to the year 1895. That each one of the judgments for the payment of which said funds were created and the taxes levied in the years 1895 and 1896 was a judgment based upon county warrants, or other certificates of indebtedness issued by said county prior to the rendition of the judgment, to pay general county expenses which the general county funds have been insufficient from time to time to meet, and that none of said judgments was rendered upon any indebtedness which ought to have been paid out of any funds other than the general county funds. It is also agreed that in January, 1894, the territorial board of equalization by a general order fixed the value, for purposes of taxation, of all broad-*guaged* railroads north and east of Albuquerque at $7,000 per mile and of all like railroads south and west of Albuquerque at $6,500 per mile of main line; and ever since that time all such railroads in New Mexico have been uniformly assessed
492 at such valuation for purposes of taxation. That at the same time said board fixed the valuation to be placed on all other classes of property, and in Valencia county property has been since that time uniformly assessed at the values fixed by said board regardless of its actual value.

It is further agreed that C. N. Sterry, who is the solicitor for the United States Trust Company of New York, and C. W. Smith, herein, and for this cause is and has been since July 1st, 1897, the solicitor for the Santa Fe Pacific Railroad Company in the Territories of New Mexico and Arizona, and the State of California, having local charge of all legal business of that company in said Territories and State, under the jurisdiction of the general solicitor, E. D. Kenna, of Chicago, Ills. That shortly after the purchase of the property sold under the decree in this cause, the purchasers paid, as an allowance to the said C. N. Sterry, a lump sum to compensate him for such services as he might be called upon thereafter in pending litigation, or in future litigation, against the receiver growing out of the receivership and the decree herein made.

It is further admitted that the owners of the bonds foreclosed in this action, and in the winter of 1897, and prior to May, 1897, sold their entire holding to the Atchison, Topeka & Santa Fe Railway Company, or to parties representing that company, for cash and securities which were not less in value than $10,000,000, and that the mortgage foreclosed in this action which secured these bonds covered the entire Western division of the Atlantic & Pacific Railroad Company, as a first mortgage, from Isleta Junction, in Bernalillo county, New Mexico, to the Colorado river, a distance of 555 miles.

493 That such purchasers also expended a large amount of money in expenses connected with such purchase, which for the purposes of this cause, may be considered as not less than $1,000,000. That the purchasers at the foreclosure sale on May 3d, 1897, represented the Atchison, Topeka & Santa Fe Railway Company, the then owners of the bonds foreclosed.

It is agreed that the above and foregoing facts, with the papers and exhibits referred to, and the records and files in this cause are all the facts to be submitted therein under the issues by either party to the court, and that the same shall be submitted at the time when the court considers the argument on the sufficiency of the plea in bar filed, and that any facts stated in such plea, where modified, changed or otherwise stated herein, shall be deemed to have been stated in the plea as herein stated, and to save the time that might be taken by joining issue of fact on such plea, it is further agreed that any fact herein stated, and not stated in said plea which may be material, may be considered by the court as plead in the plea upon the hearing of its sufficiency, and that if the plea be overruled and held insufficient, that then the court shall consider these facts, together with the records and files in the cause upon hearing and determining said cause upon the issues raised upon the intervening petition and the answer thereto, the answer to be modified to the extent of not denying any levy of taxes by Solomon Luna, but of denying that the board of county commissioners levied any taxes which Solomon Luna extended against the assessment made by him on June 7, 1897.

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C. W. SMITH, *Late Receiver, and*
U. S. TRUST COMPANY,
By C. N. STERRY, *Their Solicitor.*
TERRITORY OF NEW MEXICO,
By F. W. CLANCY, *Its Solicitor.*

That afterwards, on, to wit, said 5th day of October, 1899, an order was made and entered of record in said court in said cause, overruling the plea in bar, which said order is in words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW York, Complainant,
vs.
THE ATLANTIC & PACIFIC RAILROAD Company *et al.*, Defendants.
} In Equity. No. 1122.

Order.

Now on this 5th day of October, at the September, A. D. 1899 term of this court, this cause coming on to be heard upon the sufficiency of the plea in bar filed herein by C. W. Smith, late receiver, and the United States Trust Company of New York, which was set down for argument, and thereupon the parties appearing by their respective counsel, the sufficiency of said plea was considered by the court, and after argument, and upon due consideration—

It is ordered and adjudged that said plea be, and the same is hereby,

held to be insufficient in law or in equity to bar the further proceeding by the Territory under the matter in issue by its intervening petition.

J. W. CRUMPACKER, *Judge.*

495 That afterwards, on to wit, said 5th day of October, 1899, there was filed in the office of the clerk of said court a joint and several answer of C. W. Smith and the United States Trust Company, which said answer is in words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW York, Complainant,
vs.
THE ATLANTIC & PACIFIC RAILROAD COMpany *et al.*, Defendants. } In Equity. No. 1122.

In the matter of the intervening petition of the Territory of New Mexico filed in this cause.

The joint and several answer of the United States Trust Company of New York and C. W. Smith, late receiver in this cause, to the intervening petition of the Territory of New Mexico, which seeks to recover certain taxes alleged to have been levied in Valencia county, New Mexico.

The United States Trust Company of New York, complainant herein, and C. W. Smith, late receiver in this cause of the property of the Atlantic & Pacific Railroad Company, for their joint and several answer to the intervening petition filed by the Territory of New Mexico herein, whereby it is sought to recover or receive from said late receiver certain taxes alleged to have been levied upon the property lately in the receiver's hands in the county of Va-
496 lencia and Territory of New Mexico, say that they jointly and severally deny that any property of the Atlantic & Pacific Railroad Company liable to assessment and taxation in said county and Territory for the year 1892, or in any year from 1892 to 1896, inclusive, was not put upon the assessment books for said years, or either of them, and they further jointly and severally deny that the assessor in said county failed during either one, or all of said years, to list and place upon the assessment-rolls in his hands in any year any property of any kind, character or description belonging to the Atlantic & Pacific Railroad Company in any one of those years liable to, or subject to assessment and taxation in said county, and deny that the county assessor for said county in any one or all of said years failed to list and assess at the proper time in each of said years the identical property alleged to have been put

upon the tax-lists of 1896 by the collector of taxes for each of the several years stated in said intervening petition.

And the said parties further jointly and severally deny that the collector of taxes in said county after the tax-lists for the year 1896 had been delivered to him, proceeded to list, value and assess such property in the manner that the assessor might have done, or that he proceeded to enter such assessment in his tax-list and to assess taxes thereon, as in said intervening petition stated, and set forth.

And the said parties further jointly and severally deny that the collector of taxes for said county after the tax-rolls for 1896 for said county had been delivered to him entered upon his tax-list for the year 1892, an, or any additional assessment of property of said railroad company for the year 1892.

497 The said parties further jointly and severally answering said intervening petition deny that any taxes levied by the collector having the tax-rolls of 1896 in his hands, upon any property belonging to the Atlantic & Pacific Railroad Company became delinquent on the first day of January, 1893, or on the first day of July, 1893, or on any other day or date in any year, or that any such taxes remain unpaid and due.

And said parties further jointly and severally answering said intervening petition, deny that the collector of taxes in said county, who had in his possession the tax-rolls for the year 1896, entered upon the tax-list for 1893 an, or any additional assessment of any property of the said railroad company or levied upon any assessment of any property of said railroad company in said county any taxes as and for the year 1893.

The said parties further jointly and severally answering deny that the taxes regularly levied by the proper authorities of said county upon all the property in Valencia county for the year 1893, for territorial and county purposes *was* at the rate of thirty-seven and five-tenths mills, and deny that there *was* any taxes levied upon any assessment of any property belonging to the said railroad company in said county that ever became delinquent in the year 1894, or at any time during said year 1894.

And the said parties further jointly and severally answering deny that the collector of taxes for said county, having the tax-lists of said county for the year 1896 in his possession entered upon said list for the year 1894, an, or any additional assessment of the

498 property of the said railroad company, and deny that the taxes regularly levied by the proper authorities of said county, upon all property in said county for the year 1894 for territorial and county purposes *was* at the rate of thirty-six and seventy-five-hundredths mills, and deny that any taxes so levied by said collector on any additional assessment for the year 1894 in any sum or amount whatever, and deny that any taxes levied upon any property of said railroad company in said county for the year 1894, or for any year, ever became delinquent at any time during that year, or the year 1895.

And the said parties further jointly and severally answering deny that the collector of taxes for said county, having the tax-lists in his

possession for the year 1896, ever entered upon such lists for the year 1895, an, or any additional assessment of any property of said railroad company, and deny that the taxes regularly levied by the proper authorities of said county upon all property in Valencia county for the year 1895, for territorial and county purposes *was* at the rate of thirty-six and seventy-five-hundredths mills, and further deny that any taxes levied upon any assessment of the property of said railroad company in said county ever became delinquent in the year 1896, or at any other time.

And the said parties further jointly and severally answering, deny that the collector of taxes for said county, having the tax-lists for the year 1896 in his possession, entered upon said tax-lists an, or any additional assessment of any property belonging to the said railroad company, in said county, for the year 1896, and deny that the taxes regularly levied by the proper authorities of said county upon all property within said county for the year 1896 for territo-
499 rial and county purposes *was* at the rate of thirty-eight and seventy-five-hundredths mills and deny that any taxes levied upon the property of the said railroad company, or any portion of it, in said county for the year 1896, ever became delinquent in the year 1897, or at any other time.

And the said parties further jointly and severally answering, deny that the said C. W. Smith, late receiver in this cause, as such receiver, refused to pay any taxes levied by the collector of taxes in said county on the tax-lists of 1896, upon an assessment made by said collector upon said tax-lists of 1896.

And the said C. W. Smith, late receiver, and the United States Trust Company of New York, further jointly and severally answering, deny that any cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line or other structures erected upon the right of way of the Atlantic & Pacific Railroad Company in said county of Valencia, and constituting improvements upon the land embraced within its right of way, were placed upon or attached to any right of way of said railroad company in said county which was ever acquired by the said railroad company from any person, or persons, corporation or corporations, other than the Government of the United States, and they jointly and severally deny that any right of way owned by said railroad company in the county of Valencia was ever acquired by said Atlantic & Pacific Railroad Company from any person or persons, corporation or corporations, other than the Government of the United States, and they further jointly and severally deny that any land in Valencia county over which any right of way of the said Atlantic & Pacific Railroad Company
500 was located was ever held or owned by any person or persons, corporation or corporations other than the Government of the United States at the time of the act of Congress creating the Atlantic & Pacific Railroad Company, which was approved July 27th, 1866, or that at the date of locating said right of way through said county of Valencia under said act of Congress, the same was located over any land or lands held in private ownership.

Wherefore, the said C. W. Smith, late receiver, and the United

States Trust Company of New York, having fully and completely answered each and all of the allegations contained in the intervening petition filed herein, pray that said intervening petition be dismissed, and that they and each of them have judgment against the Territory of New Mexico for the costs incurred herein, and for such other and further relief as may seem just and equitable.

C. N. STERRY,
Solicitor for C. W. Smith and the United States Trust Company of New York.

That afterwards, to wit, on said 5th day of October, 1899, a final decree was made and entered of record in said court in said cause, which said decree is in words and figures following, to wit:

TERRITORY OF NEW MEXICO:

Second Judicial District Court, September, 1899, Term.

UNITED STATES TRUST COMPANY OF NEW YORK
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY ET AL.

In the matter of the intervening petition of the Territory of New Mexico as to taxes alleged to be due in Valencia county.

501 This cause coming on to be heard upon the intervening petition of the Territory of New Mexico and the exhibits filed therewith, the answer of the United States Trust Company of New York and C. W. Smith, the agreed statement of facts on file herein and the files and records of this cause, F. W. Clancy appearing for said intervening petitioner and C. N. Sterry appearing for defendants, the said intervening petitioner moves the court for reasons set forth in its statement in writing on file herein not to consider or admit in evidence any facts set out in the said agreed statement on file in this proceeding because the same are irrelevant and immaterial, other than the facts specified and referred to in the said statement in writing; and the court being sufficiently advised in the premises, denies the said motion; and thereupon after hearing counsel, as well for the defendants as for the intervening petitioner, the court being sufficiently advised in the premises, finds, from the facts agreed upon by the respective parties, that taxes should be paid upon fifty-five and one-half miles of improvements upon the right of way of the railroad formerly the property of the Atlantic and Pacific Railroad Company and now owned by the Santa Fe Pacific Railroad Company, where the said right of way runs over land which was held in private ownership at the time of the grant of the right of way to the Atlantic and Pacific Railroad Company, for the years 1892 to 1896, both inclusive, at a valuation of sixty-five hundred dollars per mile, such taxes to be computed upon said valuation at the rates alleged in said intervening petition to have been levied by the proper authorities of said county in each of said years re-
502 spectively, with the exception of a deduction from said rates for the years 1895 and 1896, respectively, of the levy made

for the payment of judgments against said county, said deductions being of a levy of three mills in the year 1895 and of six mills in the year 1896, such taxes to bear interest at the rate of six per cent. per annum from the dates when they respectively became delinquent for each of the years aforesaid, that is to say, one-half of the taxes levied and assessed under the levy made during the year 1892, is to bear interest at the rate aforesaid from the first day of January, 1893, and the other half thereof is to bear interest at the same rate from the first day of July, 1893, and so on in like manner for each of the years aforesaid; and a computation of the amount of taxes and interest upon the basis aforesaid, as directed by the court, having been made and agreed to by the counsel for the parties, which computation shows the amount due up to this 5th day of October, 1899, to be $74,168.70, the court finds that a decree and judgment should be entered for that amount in favor of said intervening petitioner, such decree and judgment to be a lien on the property against which said taxes were levied; and thereupon the said intervening petitioner objects to the action of the court for he reasons that it is entitled on the record as presented to this court to recover taxes upon sixty and seven-tenths miles of railroad as set out in the additional assessments which are made a part of the intervening petition; that it is entitled to recover the full amount of the levies made by the authorities of Valencia county in each of the years aforesaid; that it is entitled to recover interest upon the said taxes for each of said years as they respectively became delinquent at the statutory
503 rate of twenty-five per centum per annum; and that the judgment of this court should bear interest at the same rate; and that it is entitled further to recover the statuatory penalty of twenty-five per cent. of the total amount of taxes due for each of the years from 1893 to 1896, both inclusive, during which no returns for the purposes of taxation were made of the property upon which said taxes were levied. And the said defendants at the time and now objected and object to each, all and every of said findings, and to each, all and every of said orders, judgments and decrees rendered, including every determination made by the court upon this hearing.

It is therefore considered, ordered, adjudged and decreed by the court that the Territory of New Mexico, the intervening petitioner aforesaid, have and recover from the owners of the said fifty-five and one-half miles of railroad situate in the county of Valencia aforesaid, the sum of $74,168.70, together with its costs in this behalf expended and that this judgment and decree be and it hereby is declared to be a lien upon the said fifty-five and one-half miles of railroad, and it is hereby declared that the portions of said railroad upon which this judgment and decree shall be a lien are that portion from the point where said railroad crosses the north line of the county of Valencia to the point where it crosses the Rio Puerco; that portion of said railroad from the point where it crosses the southern boundary line of the Antonio Sedillo grant to the point where it leaves said grant crossing its western boundary line; that portion from the point where it enters one of the Laguna Indian Pueblo tracts, about eight miles north-

west from the point where it leaves said Antonio Sedillo tract, to the point where it crosses the western boundary
504 line of the Laguna Pueblo grant; and that portion from the point where it enters another of the Laguna Indian Pueblo tracts, known as No. 5, or as the Santa Ana purchase, to the point where it crosses the western boundary line of the Acoma Pueblo grant near its northwest corner; and it is further ordered, adjudged and decreed by the court that the said intervening petitioner be and it hereby is given leave to apply to the court for any further and other order which may be necessary to carry into effect this judgment.

And thereupon the said defendants by their counsel aforesaid pray an appeal from the judgment and decree of this court to the supreme court of the Territory of New Mexico and that any and all proceedings for the enforcement of this judgment and decree be stayed until the judgment of said supreme court can be had in the premises; and no objection being made to such order, it is ordered by the court that the defendants be and they hereby are severally allowed an appeal from the judgment and decree of this court to the supreme court of the Territory of New Mexico, and that proceedings for the enforcement of this judgment and decree be stayed until the judgment and opinion of said supreme court can be had.

And thereupon the intervening petitioner by its counsel prays the court for an appeal from this judgment and decree of this court to the supreme court of the Territory of Mew Mexico; it is therefore ordered by the court that the said intervening petitioner be and it hereby is allowed an appeal from this judgment and decree of this court to the supreme court of the Territory of New Mexico.

J. W. CRUMPACKER.

505 And thereafter, to wit, on the 21st day of November, 1899, there was filed in the office of the clerk of said court in said cause a stipulation; which said stipulation is in words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

United States Trust Company of New York, Complainant, vs. The Atlantic & Pacific Railroad Company *et al.*, Defendants.	In Equity.	No. 1122.

Stipulation.

It is hereby stipulated and agreed by and between F. W. Clancy, solicitor for the Territory of New Mexico, intervenor in the above-entitled cause, and C. N. Sterry, solicitor for C. W. Smith, late receiver, and The United States Trust Company of New York, defendants therein, that any and all maps or diagrams filed as ex-

hibits in said cause and referred to in the transcript of the record thereof, may be transmitted by the clerk of said district court to the clerk of the supreme court of New Mexico, with said transcript, but separately and independently, and that it shall not be necessary to print as a part of said transcript copies of any of said maps or diagrams.

F. W. CLANCY,
Solicitor for Intervenor.
C. N. STERRY,
Solicitor for Each of the Above-named Defendants.

That afterwards, to wit, on the 21st day of November, 1899, an order was made and entered of record in said cause, requiring
506 the clerk of said court to send maps, etc., filed as exhibits, to the clerk of the supreme court of New Mexico; which order is in words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE ATLANTIC & PACIFIC RAILROAD COMPANY *et al.*, Defendants.
} In Equity. No. 1122.

Order.

Whereas, it has been made to appear to the satisfaction of the judge of this court that the maps and diagrams filed as original exhibits in this cause, should be inspected by the supreme court of the Territory of New Mexico, upon appeal:

It is ordered by the court that the clerk of this court safely keep all of the exhibits so filed, and at least five days before the first day of the next regular term of said supreme court, send the same to the clerk of said supreme court at Santa Fé, New Mexico, by express, in order that the same may be considered by said supreme court in connection with the transcript of the proceedings herein.

November 21st, 1899.

J. W. CRUMPACKER, *Judge.*

That the order requiring the clerk to publish a notice to creditors of C. W. Smith, receiver, as prayed for in the petition recited on pages 180 and 181 of this transcript, was made and entered of record in said cause on the 19th day of December, 1898, which
507 said order is in words and figures following, to wit:

UNITED STATES TRUST COMPANY
vs.
ATLANTIC & PACIFIC RAILROAD COMPANY ET AL. } No. 1122.

Now, on this 19th day of December, 1898, the Santa Fe Pacific Railroad Company, by its attorney, appeared before me, at my chambers in the county of Bernalillo, Territory of New Mexico, and presented its petition in the above-entitled cause, to authorize the clerk to publish in his name the notice required to be published by the receiver to claimants against him, under the nineteenth paragraph of the decree heretofore made in said cause; and, it being made to appear that all the parties to said cause were notified of said application, and it being made to further appear that the facts stated in said petition are true,

It is ordered that said decree be modified to the extent that the clerk of this court be, and he is hereby, required to publish, at least once a week for the period of six weeks, in one or more newspapers published in Albuquerque, New Mexico, Prescott, Arizona, and Los Angeles, California, a notice to the holder or holders of any and all claims against the late receiver, C. W. Smith, or the Atlantic & Pacific Railroad Company, to present the same, in writing, to the clerk of this court, to be filed with the clerk on or before the expiration of six months from the date of the first publication of such notice.

It is further ordered that if, upon publication of such notice as is herein required, any person or persons holding claims against said receiver, do not present the same, in writing, on or before six months from the first publication, that then any and all such
508 claims shall be forever barred, as against the said receiver, the purchasers of the property sold under said decree, or their assigns.

J. W. CRUMPACKER, *Judge.*

That afterwards, to wit, on the 28th day of November, 1899, there was filed in the office of the clerk of said court, in said cause, a præcipe, which said præcipe is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

THE UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE ATLANTIC & PACIFIC RAILROAD COMPANY ET AL., Defendant.

In the matter of the intervening petition of the Territory of New Mexico in the above-entitled cause to collect certain taxes alleged to have been assessed and levied in the county of Valencia, New Mexico, in the years 1892 to 1896, inclusive.

Præcipe.

To the clerk of the district court of the second judicial district, Territory of New Mexico, sitting for the trial and hearing of causes arising under the Constitution and laws of the United States:

Please take notice that C. W. Smith, late receiver of the Atlantic & Pacific Railroad Company, and The United States Trust Company of New York, plaintiff in the above-entitled cause, jointly and severally desire to have reviewed by the supreme court of the Territory of New Mexico the following questions upon the appeal
509 granted to said parties by said court, in said cause, in the judgment therein rendered, to wit:

First.

The ruling of the district court upon the motion made by C. W. Smith, late receiver, and the United States Trust Company of New York, in the above cause, which was filed therein on the 27th day of September, 1899, and which was overruled on the 27th day of September, 1899.

Second.

The questions raised by the ruling of the court in holding as wholly insufficient in law or in equity the plea in abatement filed by C. W. Smith, late receiver, and the United States Trust Company of New York in said cause on the 27th day of September, 1899, and which was on the same day determined to be insufficient in law or in equity by the said court.

Third.

The ruling of the court below in overruling the demurrer filed on the 27th day of September, 1899, by C. W. Smith, late receiver, and the United States Trust Company of New York to the intervening petition of the Territory of New Mexico, and which was by the court on the same day overruled as to each demurrer in the demurrer contained, and as to each ground of demurrer in the demurrer contained, save and except those portions of it which were by order of

the court entered on the 27th day of September, 1899, sustained, and that the said parties desire to present each demurrer so overruled, and each ground of each demurrer so overruled, and the demurrer as a whole so overruled, and each question presented by each of such rulings separately.

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Fourth.

The said parties desire to have reviewed by the supreme court each and every question arising upon the order made by the district court on October 5, 1899, by which the district court adjudged and decreed that the plea in bar filed in said cause by said parties on the 30th day of September, 1899, was insufficient in law or in equity, and thereby overruled said plea.

Fifth.

The parties desire to have reviewed the decision of the district court that the right of way of the Atlantic & Pacific Railroad Company as it crosses over the two Spanish grants known as the Joaquin Sedillo and the Antonio Gutierrez, and each of them, was not exempt from taxation under the provisions of section 2 of the charter of the Atlantic & Pacific Railroad Company.

Sixth.

The parties desire to have reviewed the decision of the district court that the right of way of the Atlantic & Pacific Railroad Company as it crosses over the Spanish grant known as the San Clemente grant was not exempt from taxation under the provision of section 2 of the charter of the Atlantic & Pacific Railroad Company.

Seventh.

That the parties desire to have reviewed the decision of the district court that the right of way of the Atlantic & Pacific Railroad Company as it crosses over the Spanish grant known as the Nicholas Duran de Chaves was not exempt from taxation under the provisions of section 2 of the charter of the Atlantic & Pacific Railroad Company.

511

Eighth.

That the parties desire to have reviewed the decision of the district court that the right of way of the Atlantic & Pacific Railroad Company as it crosses the Spanish grant known as Antonio Sedillo grant was not exempt from taxation under the provisions of section 2 of the charter of the Atlantic & Pacific Railroad Company.

Ninth.

That the parties desire to have reviewed the decision of the district court that the right of way of the Atlantic & Pacific Railroad Company as it crosses over the Spanish grant known as the Laguna Indian Pueblo tracts was not exempt from taxation under the pro-

visions of section 2 of the charter of the Atlantic & Pacific Railroad Company.

Tenth.

The said parties desire to have reviewed the decision of the district court that the right of way of the Atlantic & Pacific Railroad Company as it crosses over the Spanish grant known as the pueblo of Laguna was not exempt from taxation under the provisions of section 2 of the charter of the Atlantic & Pacific Railroad Company.

Eleventh.

The parties desire to have reviewed the decision of the district court that the right of way of the Atlantic & Pacific Railroad Company as it crosses over the Spanish grant known as the pueblo of Acoma was not exempt from taxation under the provisions of section 2 of the charter of the Atlantic & Pacific Railroad Company.

Twelfth.

512 That the parties desire to have reviewed by the supreme court the decision of the court below that the action of Solomon Luna, as collector of Valencia county, in assessing certain property of the Atlantic & Pacific Railroad Company on June 7, 1897, and the placing of the same upon the tax-rolls of 1896, and extending a levy of taxes for the year 1892 against such assessment was valid and legal.

Thirteenth.

That the parties desire to have reviewed by the supreme court the decision of the court below that the action of Solomon Luna, as collector of Valencia county, in assessing certain property of the Atlantic & Pacific Railroad Company on June 7, 1897, and the placing of the same upon the tax-rolls of 1896, and extending a levy of taxes for the year 1893 against such assessment was valid and legal.

Fourteenth.

That the parties desire to have reviewed by the supreme court the decision of the court below that the action of Solomon Luna, as collector of Valencia county, in assessing certain property of the Atlantic & Pacific Railroad Company on June 7, 1897, and the placing of the same upon the tax-rolls of 1896, and extending a levy of taxes for the year 1894 against such assessment was valid and legal.

Fifteenth.

That the parties desire to have reviewed by the supreme court the decision of the court below that the action of Solomon Luna, as collector of Valencia county, in assessing certain property of the Atlantic & Pacific Railroad Company on June 7, 1897, and the placing of the same upon the tax-rolls of 1896, and extending a levy of taxes for the year 1895 against such assessment was valid and legal.

513

Sixteenth.

That the parties desire to have reviewed by the supreme court the decision of the court below that the action of Solomon Luna, as collector of Valencia county, in assessing certain property of the Atlantic & Pacific Railroad Company on June 7, 1897, and the placing of the same upon the tax-rolls for 1896, and extending a levy of taxes for the year 1896 against such assessment was valid and legal.

Seventeenth.

That the parties desire to have reviewed the determination of the district court that the assessment made by Solomon Luna in 1897 upon the assessment-roll of 1896 of any of the property of the Atlantic & Pacific Railroad Company was a sufficient description upon which any assessment could be made, or taxes legally levied.

Eighteenth.

The parties desire to have reviewed by the supreme court the question determined by the district court that the assessment made by Solomon Luna June 7, 1897, upon the assessment-roll of 1896 of any of the property attempted by him to be assessed as belonging to the Atlantic & Pacific Railroad Company, was a sufficient assessment when he, the said Solomon Luna, at that time knew that the property he attempted to assess was the property of the purchasers at the sale under the decree of foreclosure

Nineteenth.

The said parties desire to have reviewed by the supreme court the question as to the right to charge any interest on any sum or amount of taxes found to be due by the court from any time or date prior to December 15, 1897.

514

Twentieth.

The parties desire to have reviewed by the supreme court all questions involved in the final decree which arise under the issues joined by the answer to the intervening petition of the Territory and the agreed statement of facts upon which the court heard the same.

Twenty-first.

The parties desire to have reviewed the question of the decision of the district court that F. W. Clancy had authority sufficient to authorize him to file said intervening petition.

You will, therefore, make a transcript for the supreme court consisting of each and all of the following portions of the record that said parties deem necessary for the purpose of such review:

A copy of the bill in equity filed in said cause by the United States Trust Company of New York against the Atlantic & Pacific Railroad Company *et al.*

A copy of the order appointing the receiver made by the judge of the second judicial district court upon said petition.

A copy of the decree entered by the court in the above-entitled cause foreclosing the mortgage sought to be foreclosed by the bill in equity.

A copy of the decree confirming the sale made under the decree of foreclosure, which decree of confirmation was entered May 4, 1897.

A copy of the intervening petition filed by the Territory of New Mexico on the 10th day of June, 1897, in your office in the above-entitled cause which sought to recover from the parties thereto,
515 or the receiver, certain taxes alleged to have been levied in Valencia county, N. M., upon certain property of the Atlantic & Pacific Railroad Company, and which were alleged to be due and unpaid.

A copy of the pleas filed thereto by the United States Trust Company of New York and C. W. Smith, receiver, on the 23d day of June, 1897.

A copy of the order made by the district court upon the matter of the intervening petition on the 23d day of June, 1897.

The petition of the Santa Fe Pecific Railroad Company filed in said cause on the 19th day of December, 1898, for an order authorizing the clerk of this court to publish notice to the creditors of C. W. Smith, late receiver of the Atlantic & Pacific Railroad Company.

A copy of the order entered of record in said cause on the 19th day of December, 1898, granting said petition.

A copy of the notice published by the clerk of this court April 3, 1899, in the various newspapers.

A copy of the proceedings had in said cause on the 4th day of August, 1899, upon the mandate of the supreme court of New Mexico.

A copy of the amended motion to dismiss the intervening petition of the Territory of New Mexico filed by C. W. Smith, late receiver, and the United States Trust Company of New York in said cause and court on the 27th day of September, 1899.

Also, each of the affidavits of C. N. Sterry and of F. W. Clancy filed in support of and against said motion on the 27th day of September, 1897.

Also, the order made by the court in said cause overruling said motion.

516 Also, the plea in abatement filed in said cause by the said C. W. Smith, late receiver, and the United States Trust Company of New York on the 27th day of September, 1899.

Also, the order made thereon, and made concerning the demurrer subsequently filed by the same parties in said cause.

Also, copy of the joint and several demurrer of the said C. W. Smith, late receiver, and the United States Trust Company of New York filed in said cause on the 27th day of September, 1899.

Also, a copy of the joint and several plea in bar filed in said cause by C. W. Smith, late receiver, and the United States Trust Company

of New York, and the agreed statement of facts filed in said cause on the 5th day of October, 1899, and copy of the order made by the court in said cause on the 5th day of October, 1899, holding the plea in bar referred to insufficient.

Also, copy of the joint and several answer filed in said cause on the 5th day of October, 1899, by said C. W. Smith, late receiver, and the United States Trust Company of New York.

Also, copy of the judgment of the final decree entered in said cause in the matter of the intervening petition of the Territory of New Mexico on the 5th day of October, 1899.

Also, the stipulation filed in said cause concerning certain exhibits which was filed November 21, 1899, and the order of the court made thereon the same day.

Also, copy of the order settling the transcript, made by the judge on the 27th day of November, 1899.

517 Also, copy of this præcipe, and copies of the acknowledgment of counsel.

Respectfully, C. N. STERRY,
Attorney for C. W. Smith and the United States Trust Company of New York.

TERRITORY OF NEW MEXICO, *Second Judicial District,* } ss:

I, Harry P. Owen, clerk of the district court of the second judicial district of the Territory of New Mexico, do hereby certify that the above and foregoing is a true, correct and complete transcript of so much and such parts of the record as the said defendants desire to have reviewed by the honorable, the supreme court of the Territory of New Mexico, as the same appears from the records and files in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 29th day of November, 1899.

[SEAL.] HARRY P. OWEN, *Clerk.*

518 To the Territory of New Mexico or F. W. Clancy, its solicitor of record:

You will please take notice that the above and foregoing is a transcript of all the record and all the evidence in the above cause which are involved, or to be involved, upon the hearing by the supreme court of the Territory of any and all questions to be presented by C. W. Smith, late receiver of the Atlantic & Pacific Railroad Company, or the United States Trust Company of New York, upon the appeal from the judgment rendered in the matter of the intervention of the Territory of New Mexico to recover certain taxes alleged to have been levied in Valencia county, New Mexico, in the cause wherein The United States Trust Company of New York is plaintiff and The Atlantic & Pacific Railroad Company *et al.* are defendants, pending in the district court of the second judicial dis-

trict of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States.

C. N. STERRY,
Solicitor for C. W. Smith, Late Receiver, and the United States Trust Company of New York.

I, F. W. Clancy, as solicitor for the Territory of New Mexico, in the intervention above referred to, do hereby acknowledge receipt of the above and foregoing transcript prepared and served upon me as above stated.

F. W. CLANCY,
Solicitor for the Territory of New Mexico.

TERRITORY OF NEW MEXICO, *Second Judicial District,* } ss:

519 I, J. W. Crumpacker, associate justice of the supreme court of the Territory of New Mexico, and judge of the court for the hearing and trial of causes arising under the Constitution and laws of the United States, in the second judicial district of the Territory of New Mexico, do hereby certify that the above and foregoing transcript of the record in the above-entitled cause, and the proceedings had therein, has been duly served upon F. W. Clancy, solicitor for the Territory of New Mexico, therein, and the said F. W. Clancy has not claimed that any portion of the record, or of the evidence heard in the proceedings had upon the intervening petition of the Territory of New Mexico, upon which the judgment appealed from is based, essential to the hearing in the supreme court upon the appeal from said judgment, has been omitted.

Now, therefore, I, as such associate justice, and judge of said court, do hereby certify that the above and foregoing transcript contains all of the evidence heard in the proceedings resulting in the judgment in favor of the Territory of New Mexico and against C. W. Smith, late receiver of the Atlantic & Pacific Railroad Company, in the sum of $74,168.70, on the 5th day of October, 1899.

J. W. CRUMPACKER,
Associate Justice of the Supreme Court of New Mexico and Judge of the Second Judicial District Court.

520 And afterwards, on, to wit, the 20th day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a stipulation by parties; which said stipulation was and is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1900.

THE UNITED STATES TRUST COMPANY OF NEW YORK
vs.
ATLANTIC & PACIFIC RAILROAD COMPANY ET AL. } No. 853.

In the matter of the intervening petition of the Territory of New Mexico to collect taxes alleged to have been levied in the county of Valencia.

It is hereby stipulated and agreed that in the preparation and printing of the record for the purpose of reviewing the judgment and proceedings in this matter by inadvertance there has been omitted a certain statement, in writing, filed on behalf of the intervening petitioner and referred to in the final decree of the district court; that the same is a proper part of said record for the purpose of said review, and that the said intervening petitioner may cause the same to be printed, together with this stipulation, and filed in the supreme court, and that when so completed and filed the same may be taken and considered by this supreme court as a part of the record herein upon both of the appeals which have been taken, the same as though it had been included in the record heretofore made up and printed.

F. W. CLANCY,
Solicitor for Intervening Petitioner.
C. N. STERRY,
Solicitor for the United States Trust Company of New York and C. W. Smith, Receiver.

521 And afterwards, on, to wit, *on* the 23rd day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors; which said assignment of errors is in words and figures as follows, to wit:

January Term, 1900.

THE UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE ATLANTIC & PACIFIC RAILROAD COMPANY ET AL., Defendants.

In the matter of the intervening petition of the Territory of New Mexico in the above-entitled cause to collect certain taxes alleged to have been assessed and levied in the county of Valencia, New Mexico, in the years 1892 to 1896, inclusive.

THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W. Smith, Late Receiver, Appellants,
vs.
THE TERRITORY OF NEW MEXICO, Appellee.

522 Comes now C. W. Smith, late receiver, in the above-entitled cause, and the United States Trust Company, and they, and each of them jointly and severally make assignments of error in said cause, as follows, to wit:

I.

The court erred in overruling the motion to dismiss said intervention petition filed on September 27th, 1899, by the said C. W. Smith and the United States Trust Company.

II.

The court erred in holding the plea in abatement filed on the 27th day of September, 1899, to the intervening petition of C. W. Smith and the United States Trust Company insufficient and in overruling the same.

III.

The court erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand, five hundred and fifty dollars ($394,550) by the collector of Valencia county on the tax-rolls for the year 1896 for the year 1892; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

IV.

The court erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have
523 been assessed at the sum of three hundred and ninety-four thousand, five hundred and fifty dollars ($394,550) by the collector of Valencia county on the tax-rolls for the year 1896 for the year 1893; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

V.

The court erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand, five hundred and fifty dollars ($394,550) by the collector of Valencia county on the tax-rolls for the year 1896 for the year 1894; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

VI.

The court erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand, five hundred and fifty dollars ($394,550) by the collector of Valencia county on the tax-rolls for the year 1896 for the year 1895; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

VII.

The court erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand, five hundred and fifty dollars ($394,550) by the collector of Valencia county on the tax-rolls for the year 1896 for the year 1896; and erred in the overruling of each and every portion of said de-
524 murrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

VIII.

That the court erred in overruling the said demurrer, and each and every part thereof, to the extent the same was overruled; and also erred in the ruling upon each proposition contained in the said demurrer which was by the court overruled.

IX.

That the court erred in holding the plea in bar filed by said parties in said cause insufficient and in overruling the same.

X.

That the court erred in holding that the right of way of the Atlantic and Pacific Railroad Company where it crossed the two Spanish grants known as the Joaquin Sedillo and Antonio Gutierrez, or either of them, was not exempt from taxation.

XI.

The court erred in holding that the right of way of the Atlantic and Pacific Railroad Company, as it crossed the San Clemente grant was not exempt from taxation.

XII.

The court erred in holding that the right of way of the Atlantic and Pacific Railroad Company, as it crossed the grant known as the Nicholas Duran de Chaves, was not exempt from taxation.

XIII.

The court erred in holding that the right of way of the Atlantic and Pacific Railroad Company, as it crossed the grant known as the Antonio Sedillo, was not exempt from taxation.

XIV.

525 The court erred in holding that the right of way of the Atlantic and Pacific Railroad Company, as it crossed the grant known as the Laguna Indian Pueblo tracts, was not exempt from taxation.

XV.

The court erred in holding that the right of way of the Atlantic and Pacific Railroad Company, as it crossed the grant known as the pueblo of Laguna, was not exempt from taxation.

XVI.

The court erred in holding that the right of way of the Atlantic and Pacific Railroad Company, as it crossed the grant known as the pueblo of Acoma, was not exempt from taxation.

XVII.

The court erred in holding that Solomon Luna, as collector of Valencia county, on June 7th, 1897, had any authority to make any additional assessments upon the tax-rolls of 1896 of any of the property of the Atlantic and Pacific Railroad Company.

XVIII.

The court erred in holding that Solomon Luna, as collector of Valencia county, on June 7th, 1897, had any right or authority to extend upon the tax-rolls of 1896, an assessment of any property of the Atlantic and Pacific Railroad Company for 1892, and to extend any levy of taxes against any such assessment.

XIX.

The court erred in holding that Solomon Luna, as collector of Valencia county, on June 7th, 1897, had any right or authority to extend upon the tax-rolls of 1896, an assessment of any property of the Atlantic and Pacific Railroad Company for 1893, and to extend any levy of taxes against any such assessment.

XX.

526 The court erred in holding that Solomon Luna, as collector of Valencia county, on June 7th, 1897, had any right or au-

thority to extend upon the tax-rolls of 1896, an assessment of any property of the Atlantic and Pacific Railroad Company for 1894, and to extend any levy of taxes against any such assessment.

XXI.

The court erred in holding that Solomon Luna, as collector of Valencia county, on June 7th, 1897, had any right or authority to extend upon the tax-rolls of 1896, an assessment of any property of the Atlantic and Pacific Railroad Company for 1895, and to extend any levy of taxes against such assessment.

XXII.

The court erred in holding that Solomon Luna, as collector of Valencia county, on June 7th, 1897, had any right or authority to extend upon the tax-rolls of 1896, an assessment of any property of the Atlantic and Pacific Railroad Company for 1896, and to extend any levy of taxes against any such assessment.

XXIII.

The court erred in holding that any interest should be charged prior to December, 1897, upon any taxes found to be due for any year.

XXIV.

The court erred in holding that F. W. Clancy had sufficient authority to authorize him to file the intervening petition in the name of and for and on behalf of the Territory of New Mexico.

XXV.

The court erred in holding and determining the issues joined by the answer to the intervening petition of the Territory against the said C. W. Smith and the United States Trust Company.

XXVI.

527 The court erred in determining upon the agreed statement of facts that fifty-five and one-half (55½) miles of improvements on the right of way of the railroad formerly the property of the Atlantic and Pacific Railroad Company *was* assessable, and that the taxes levied upon such improvements, upon the assessments made by the collector should be paid.

XXVII.

The court erred in determining that the taxes ascertained to be due upon the improvements of the right of way should bear interest from any date prior to the 1st day of January, 1898.

XXVIII.

The court erred in determining that the amount due as taxes and interest upon the property in controversy on the 5th day of October,

1899, was the sum of seventy-four thousand, one hundred and sixty-eight dollars and seventy cents ($74,168.70).

XXIX.

The court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1892.

XXX.

The court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1893.

XXXI.

The court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1894.

XXXII.

The court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1895.

528 XXXIII.

The court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1896.

C. W. SMITH,
Late Receiver of the Atlantic and Pacific Railroad Company, and
THE UNITED STATES TRUST COMPANY OF NEW YORK,
By C. N. STERRY, *Their Solicitor.*

529 And afterwards, on, to wit, the 27th day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an additional transcript of record; which said additional transcript of record is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, January Term, 1900.

UNITED STATES TRUST COMPANY OF NEW YORK
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY ET AL. } No. 853.

In the matter of the intervening petition of the Territory of New Mexico to collect taxes alleged to have been levied in the county of Valencia.

It is hereby stipulated and agreed that in the preparation and printing of the record for the purpose of reviewing the judgment

and proceedings in this matter, by inadvertence there has been omitted a certain statement in writing filed on behalf of the intervening petitioner and referred to in the final decree of the district court; that the same is a proper part of said record for the purposes of said review; and that the said intervening petitioner may cause the same to be printed together with this stipulation and filed in the supreme court and that when so completed and filed the same may be taken and considered by this supreme court as a part
530 of the record herein upon both of the appeals which have been taken the same as though it had been included in the record heretofore made up and printed.

F. W. CLANCY,
Solicitor for Intervening Petitioner.
C. N. STERRY,
Solicitor for United States Trust Company of New York and C. W. Smith, Receiver.

Second Judicial District, Territory of New Mexico, September Term, 1899.

UNITED STATES TRUST COMPANY OF NEW YORK
vs.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY ET AL.

In the matter of the intervening petition of the Territory of New Mexico as to taxes claimed to be due in Valencia county.

Now comes the said intervening petitioner and says that the main facts to be considered by the court and material to the decision of this court are the following:

That the collector of taxes for Valencia county made the additional assessments set up and referred to in the intervening petition, of property which had not been theretofore assessed and placed upon the assessment-rolls in any way so that it could be identified or the validity of the assessment be determined; that the line of road, the improvements upon which were assessed by the collector as aforesaid, runs through Spanish grants as follows: Through the Joaquin Sedillo and Antonio Gutierrez grants for a distance of four miles; through the San Clemente for a distance of ten and one-half miles; through the Nicolas Duran de Chavez grant for a distance of 2, ¼ miles; through the Antonio Sedillo grant for a distance of 13 miles; through a portion of the Laguna purchases for a distance of 7 miles; through the Laguna Pueblo grant for a distance of 6, ½ miles; and through the Acoma
531 Pueblo grant for a distance of 12, ¼ miles, making a total of 55, ½ miles; that of said grants, the Laguna purchases were confirmed by Congress in 1860, the Acoma Pueblo grant was confirmed by Congress in 1858, and each of the other grants have been confirmed by the court of private land claims, which court, in each case, has declared the title to have been complete and perfect at or before the time of the acquisition of sovereignty by the United

States over the country embraced within the present Territory of New Mexico, and that all such confirmations have become final with the exception of the confirmation of the Joaquin Sedillo and Antonio Gutierrez grants, which is now pending on appeal in the Supreme Court of the United States; that no appeal was taken by any one from the assessments made by the collector aforesaid although there was opportunity for the taking of such appeal after the filing of the intervening petition in this cause; that no return was made by any one of the property in question in the years 1893, 1894, 1895 and 1896; and that all parties interested in said property have had full knowledge that there was a claim of a right to tax the property, certainly ever since the fall of 1892.

And the intervening petitioner insists that, the foregoing facts being admitted, there can be no other material or relevant facts for this court to consider under the only issue which can properly be raised in pursuance of the mandate of the Supreme Court of the United States and the views expressed in the opinion of that court; and that therefore the intervening petitioner objects to the consideration by the court of any other facts set out in the agreed statement on file in this proceeding because the same are irrelevant and immaterial.

F. W. CLANCY,
Solicitor for Intervening Petitioner.

532 And afterwards, to wit, on the 11th day of January, A. D. 1900, there was filed in the office of the clerk of the said supreme court an assignment of errors; which said assignment of error- is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, at the January Term, 1900.

THE TERRITORY OF NEW MEXICO, Appellant,
vs.
THE UNITED STATES TRUST COMPANY OF NEW YORK *et al.*, Appellees. } No. 854.

Now comes the said appellant and says that there is manifest error in the record and proceedings of the court below, whence this cause came into this court, and specifies the following errors:

1. The court below erred in permitting appellees to file motions to dismiss after the case was remanded from this court, and while pleas in bar were pending and undisposed of.

2. The court below erred in permitting the withdra*w*al of the pleas filed in June, 1897, by which appellees had distinctly and unequivocally admitted that 58 miles of the railroad sought to be taxed were and are through land which was not Government land, but which belonged to private individuals or corporations and was acquired by the railroad company under and through the rights conferred upon it by the act of Congress.

3. The court below erred in permitting appellees to file pleas

raising any question as to the sufficiency of the assessments relied on by appellant, after the validity of such assessments had been passed upon by the Supreme Court of the United States.

4. The court below erred in denying the motion of appellant not to consider or admit in evidence any facts set out in the agreed statement of facts other than those specified and referred to in the statement in writing filed by appellant in the court below.

5. The court below erred in refusing to hold that appellant was entitled to recover taxes upon 60.7 miles of railroad.

6. The court below erred in refusing to hold that appellant was entitled to recover the full amount of the levies made by the authorities of Valencia county in each of the years from 1892 to 1896, both inclusive.

7. The court below erred in refusing to hold that appellant was entitled to recover interest upon the taxes for each of the years in question as they respectively became delinquent at the statutory rate of twenty-five per centum per annum.

8. The court below erred in refusing to hold that the judgment should bear interest at the rate of twenty-five per centum per annum.

9. The court below erred in refusing to hold that appellant was entitled to recover the statutory penalty of twenty-five per cent. of the total amount of taxes due for each of the years from 1893 to 1896, both inclusive, during which no returns for the purposes of taxation were made of the property upon which said taxes were levied.

Wherefore the said appellant prays that the decree of the court below may be vacated and set aside and that a decree be entered in this court in accordance with law as applied to the facts disclosed by the record, by which decree the errors hereby assigned and complained of may be corrected.

F. W. CLANCY,
Counsel for Appellant.

EDWARD L. BARTLETT,
Solicitor General.

533 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government, on the first Wednesday after the first Monday in January, the same being the 3rd day of January, A. D. 1900, on the twenty-third day thereof, the same being Monday, the 29th day of January, A. D. 1900, the following, among other, proceedings were had, as follows, to wit:

THE UNITED STATES TRUST Company of New York and C. W. Smith, Receiver, Appellants,
vs.
THE TERRITORY OF NEW MEXICO, Appellee.
} No. 853. Appeal from District Court, 2nd Judicial District.

This cause, coming on to be heard upon the transcript of record, assignment of errors, and brief of counsel, is argued by C. N. Sterry, Esq., for appellants, and continued until tomorrow morning.

And afterwards, *on* to wit, at the said regular term of the said supreme court, on the twenty-fourth day thereof, the same being Tuesday, January 30th, A. D. 1900, the following, among other, proceedings were had, as follows, to wit:

THE UNITED STATES TRUST Company of New York and C. W. Smith, Receiver, Appellants,
vs.
THE TERRITORY OF NEW MEXICO, Appellee.
} No. 853. Appeal from District Court, 2nd Judicial District.

This cause, again coming on to be heard upon the transcript of record, assignment of errors, and brief of counsel, is further argued by C. N. Sterry, Esq., for appellants, and F. W. Clancy, Esq., for appellee, and submitted to the court, and the court, not
534 being sufficiently advised in the premises, takes the same under advisement.

And afterwards, *on* to wit, at the said regular term of the said supreme court, on the thirty-eight- day thereof, the same being Thursday, the 23rd day of August, A. D. 1900, the following, among other, proceedings were had, as follows, to wit:

THE UNITED STATES TRUST Company of New York *et al.*, Appellants,
vs.
THE TERRITORY OF NEW MEXICO, Appellee.
} No. 853. Appeal from District Court, 2nd Judicial District *Court.*

THE TERRITORY OF NEW MEXICO, Appellant,
vs.
THE UNITED STATES TRUST Company of New York *et al.*, Appellees.
} No. 854. Appeal from District Court, 2nd Judicial District.

These causes having been argued and submitted to the court upon a former day of the present term, and the court, being now sufficiently advised in the premises, announces its decision by Chief Justice Mills, Associate Justices McFie and Parker concurring, modifying and affirming the judgment of the court below for reasons stated

in the opinion of the court on file, modifying and reducing the amount of the decree of the court below from which these appeals were both taken, and directing the entry of judgment in this court in favor of the Territory of New Mexico for the sum of sixty-one thousand nine hundred and twenty-two dollars and seventy-three cents, with interest thereon, at the rate of six per cent. per annum, from the 5th day of October, A. D. 1899, until paid. It is therefore ordered, adjudged, and decreed by the court that the Terri-
535 tory of New Mexico do have and recover the sum of sixty-one thousand nine hundred and twenty-two dollars and seventy-three cents from the owners of the fifty-five and one-half miles of railroad, formerly the property of the Atlantic and Pacific Railroad Company and now owned by the Santa Fe Pacific Railroad Company, where the same runs over land which was held in private ownership at the time of the grant of the right of way to the Atlantic & Pacific Railroad Company, hereinafter particularly described, together with interest on said sum from the fifth day of October, 1899, until paid, at the rate of six per cent. per annum, and its costs in this behalf expended, to be taxed; and it is hereby declared that this judgment and decree is a lien upon the said fifty-five and one-half miles of said railroad, and it is hereby declared that the portion- of said railroad upon which this judgment and decree shall be a lien are that portion from the point where said railroad crosses the north line of the county of Valencia to the point where it crosses the Rio Puerco; that portion of said railroad from the point where it crosses the southern boundary line of the Antonio Sedillo grant to the point where it leaves said grant crossing, its western boundary line; that portion from the point where it enters one of the Laguna Indian Pueblo tracts, about eight miles northwest from the point where it leaves said Antonio Sedillo tract, to the point where it crosses the western boundary of the Laguna Pueblo grant, and that portion from the point where it enters another of the Laguna Pueblo tracts, known as No. 5 or as the Santa Ana purchase, to the point where it crosses the western boundary line of the Acoma Pueblo grant, near its northwest corner; and it is further ordered, adjudged, and decreed by the court that the said intervening petitioner be, and it is hereby, given leave to apply to the court for any further and other order which may be necessary to carry into effect this judgment; and thereupon the appellants in the case numbered 853, being the appellees in the case numbered 854, pray an appeal from so much of this judgment and decree as allows any recovery by the Territory of New Mexico to the Supreme Court of the United States, and that any and all proceedings for the enforcement of this judgment
536 and decree be stayed until the judgment of said Supreme Court of the United States can be had on said appeal, and, counsel for the Territory consenting to such order staying proceedings as aforesaid, it is ordered by the court that the appellants be, and they hereby are, allowed the appeal prayed to the Supreme Court of the United States, and that proceedings for the enforcement of this judgment and decree be stayed until the judgment and opinion of said Supreme Court of the United States can be had; and

thereupon the Territory of New Mexico, by its counsel, prays the court for an appeal from this judgment and decree to the Supreme Court of the United States. It is therefore ordered by the court that the Territory of New Mexico be, and hereby is, allowed an appeal from this judgment and decree to the Supreme Court of the United States.

And afterwards, *on* to wit, at the said regular term of the said supreme court, on the thirty-ninth day thereof, the same being Friday, the 24th day of August, the following, among other, proceedings were had, as follows, to wit:

THE UNITED STATES TRUST COMPANY of New York *et al.*, Appellants,
vs.
THE TERRITORY OF NEW MEXICO, Appellee.
} No. 853. Appeal from District Court, 2nd Judicial District.

THE TERRITORY OF NEW MEXICO, Appellant,
vs.
THE UNITED STATES TRUST COMPANY of New York *et al.*, Appellees.
} No. 854. Appeal from District Court, 2nd Judicial District.

Now comes The Territory of New Mexico, by its counsel, F. W. Clancy, and moves the court to make and certify, for use on
537 appeal to the Supreme Court of the United States, instead of the evidence at large, a statement of the facts of the case, in accordance with the requirements of the act of Congress, April —, 1874, to be transmitted to said Supreme Court, together with the transcript of the proceedings and judgment and decree, and submits to the court a proposed statement of facts for certification; and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on, to wit, the 24th day of August, A. D. 1900, there was filed in the office of the clerk of the said Supreme Court a statement of facts; which said statement of facts was and is in words and figures as follows, to wit:

538 In the Supreme Court of the Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK *et al.*
vs.
TERRITORY OF NEW MEXICO.
} No. 853.

TERRITORY OF NEW MEXICO
vs.
THE UNITED STATES TRUST COMPANY OF NEW YORK *et al.*
} No. 854.

The court having entered its judgment in these causes, and both sides having taken appeals from that judgment to the Supreme

Court of the United States, and the Territory of New Mexico, by its counsel, having applied to the court to make a statement of facts in these cases for use, instead of the evidence at large, on said appeals, in accordance with the provisions of the act of Congress entitled "An act concerning the practice in territorial courts and appeals therefrom," which became a law on the 7th of April, 1874, which application is resisted by the appellants in case No. 853, being the appellees in case No. 854, upon the ground that the case in the court below was tried upon an agreed statement of facts, which was made a part of the record upon appeal to this court, and that therefore it would not be proper for this court to make or certify any other or different statement of the facts, and that if this court should make any certificate whatever it should adopt said agreed statement as its statement of said facts, while the said Territory of New Mexico contends that the said agreed statement of facts set out the evidence at large and that its appeal would be unavailing unless the statement for which it has asked be made, and this court being willing and desirous that the respective parties be allowed to get their appeals before the Supreme Court of the United States in such shape as their counsel deem proper, the court hereby certifies for use upon the appeal of the said The United States Trust Company of New York and C. W. Smith, receiver,
539 that this case was tried in the court below upon an agreed statement of facts, which agreed statement of facts was made part of the record in the district court and part of the record upon appeal to this court, and is to be a part of the record on appeal to the Supreme Court of the United States; that the said agreed statement sets out the facts of this case which were heard or considered by this court upon said appeal, and the same is hereby adopted by this court as its statement of such facts for use upon the appeal aforesaid without here repeating the same.

And the court further certifies for use upon the appeal of the said Territory of New Mexico, in accordance with the prayer of the said appellant, the following statement of facts:

The court finds that the collector of taxes for Valencia county made the additional assessments set up and referred to in the intervening petition of property which had not been theretofore assessed and placed upon the assessment-rolls in any way so that it could be identified or the validity of the assessment be determined; that the line of road the improvements upon which were assessed by the collector aforesaid runs through Spanish grants as follows: Through the Joaquin Sedillo and Antonio Gutierrez grants for a distance of four miles; through the San Clemente grant for a distance of ten and one-half miles; through the Nicolas Duran de Chaves grant for a distance of two and one-quarter miles; through the Antonio Sedillo grant for a distance of thirteen miles; through a portion of the Laguna purchases for a distance of seven miles; through the Laguna Pueblo grant for a distance of six and one-half miles, and through the Acoma Pueblo grant for a distance of twelve and one-quarter miles, making a total of fifty-five and one-half miles; that of said grants the Laguna purchases were confirmed

by Congress in 1860, the Acoma Pueblo grant was confirmed by Congress in 1858, and each of the other grants has been confirmed by the court of private land claims, which court, in each case, declared the title to have been complete and perfect
540 at or before the time of the acquisition of sovereignty by the United States over the country embraced within the present Territory of New Mexico, and that all such confirmations have become final; that no appeal was taken by any one from the assessments made by the collector aforesaid, although there was opportunity for the taking of such appeal after the filing of the intervening petition in this cause; that no return was made by any one of the property in question in the years 1893, 1894, 1895, and 1896; that all parties interested in such property have had full knowledge that there was a claim of the right to tax the property ever since the fall of 1892, and that F. W. Clancy, who has conducted this litigation on behalf of the Territory of New Mexico, has done so under employment by the board of county commissioners of the county of Valencia, in pursuance of the provisions of an act of the legislative assembly of the said Territory which became a law March 5, 1897, and which now appears as sections 649 and 650 of the Compiled Laws of 1897.

The court further finds that on the 7th day of June, 1897, the collector of Valencia county, New Mexico, prepared a notice of the fact that he had made the assessments made by him on that date, and mailed to their addresses a copy of such notice to C. W. Smith, receiver, and to the local solicitor of the United States Trust Company of New York, Mr. Neill B. Field, and to Mr. C. N. Sterry, solicitor for the said receiver, which notices were duly received by the parties to whom they were addressed in due course of mail.

The court further finds that the only evidence, except as hereinafter stated, as to the fair, actual cash value of the railroad property, for the recovery of the taxes upon which this proceeding was begun, during the term from June 1, 1892, to June 1, 1897, shows that such value did not exceed $605,000 in any year, and that during the years referred to the assessor of Valencia county in each year attempted to assess the property placed upon the tax-rolls at what was thought to be fifty per cent. of its fair, actual cash
541 value.

The court further finds that in January, 1894, the territorial board of equalization of the Territory of New Mexico by general order fixed the value for purposes of taxation of all broad-gauged railroads north and east of Albuquerque at $7,000 per mile, and of all like railroads south and west of Albuquerque at $6,500 per mile, of main line, and ever since that time all such railroads have been uniformly assessed at such valuation for purposes of taxation, and that at the same time the board fixed the valuation to be placed on all other classes of property, and in Valencia county property has been since that time uniformly assessed at the values fixed by said board regardless of its actual value.

The court further finds that the purchasers at the foreclosure sale on May 3, 1897, represented the then owners of the mortgage bonds,

and that such owners paid and expended not less than $11,000,000 to secure the title to the Western division of the Atlantic and Pacific railroad from Isleta junction, in Bernalillo county, New Mexico, to the Colorado river, a distance of 555 miles, of which Western division the property to recover taxes upon which this proceeding was begun is a part.

And the court certifies this statement by the hand of its chief justice and directs the clerk to include it in the record to be transmitted by him to the Supreme Court of the United States, and also certifies that the Territory of New Mexico, by its counsel, objects to any finding as to the giving of a notice by the collector of Valencia county on the 7th day of June, 1897, of the assessments made by him on that day, for the reason that it is of an immaterial fact, and the United States Trust Company of New York *et als.* object and except to each of the findings made at the request of the Territory of New Mexico on the ground that they are unauthorized and are conclusions of law and not of fact.

WILLIAM J. MILLS,
Chief Justice, etc.

542 And afterwards, on, to wit, the 23rd day of August, A. D. 1900, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an opinion of the court; which said opinion of the court is in words and figures as follows, to wit:

543 In the Supreme Court, Territory of New Mexico, January Term, 1900.

THE UNITED STATES TRUST COMPANY of New York *et als.*, Appellants,
vs.
TERRITORY OF NEW MEXICO, Appellee & Cross-appellant.

Nos. 853 & 854. Appeal from Bernalillo County, 2nd Judicial District.

Syllabus.

1. The right of way and the improvements thereon on that portion of the Atlantic & Pacific R. R. Co. running through the Territory over what was not public domain on July 27th, 1866, is liable to taxation.
2. A collector of taxes in a county, after the tax-lists have been delivered to him, when he ascertains that any real estate or personal property then in his county has been omitted from the list, can list, value, and assess such property in the same manner that the assessor might have done, enter such assessment in his tax-lists, and extend the levy of tax as against such assessments.
3. Under section 649, Compiled Laws of 1897, an attorney employed as special counsel by a county to bring suit for delinquent taxes is authorized to file an intervening petition in the name of the Territory.

4. The original suit being still pending and the order confirming the sale of the railroad specifying that any taxes which may finally be adjudged to be a lien upon the property should be a liability on the railroad is sufficient notice to such purchasers of a claim for taxes, and in an intervening petition filed in the original suit to collect such delinquent taxes the purchasers at such sale need not be made parties thereto.
5. An assessment of property is void when the valid portion of any of the tax cannot be separated, but not so when it is separable, and when a railroad a part of which is taxable is assessed at a given sum per mile, when the number of miles taxable is ascertained, it is separable and does not invalidate the assessment because it differs from the number of miles described in the original assessment.

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6. When pleas in bar are pending and undisposed of it is the better practice to first dispose of them before allowing a motion to dismiss to be filed.
7. Before the passage of the so-called Bateman act, chapter 42, Laws of 1897, judgments could be taken against a county for debts due by it for current expenses, where the total indebtedness of such county was not greater than that permitted by the act of Congress approved June 30, 1886, and taxes could be legally levied to pay such judgments; and when a claim against a county is merged into a judgment, such judgments cannot be collaterally attacked.
8. When the penalty for the failure to render a true list of property is not made by the assessor or collector it cannot be recovered in a suit brought to recover delinquent taxes.
9. Judgments for the recovery of delinquent taxes due before the passage of chap. 22, sec. 34, Laws of 1899, bear interest at the rate of 6 % per annum from the date of such judgment, and not at the rate of 6 % per annum from the date they became due.

C. N. Sterry, Esq., counsel for appellants.

Frank W. Clancy, Esq., with whom on the brief was E. L. Bartlett, Esq., solicitor general of the Territory of New Mexico, counsel for appellee and cross-appellants.

MILLS, *C. J.:*

The examination of this case has been most laborious. The transcript of record covers some five hundred and twenty pages. The several briefs filed by the appellants contain upwards of one hundred and sixty pages, and that of the appellee and cross-appellant fifty pages. The appellant assigns thirty-three grounds of error, while the cross-appellant is content with the more modest claim of only nine. While we have carefully considered all of the errors alleged by both the appellant and the cross-appellant, we will not treat each of them separately, but will only discuss such of them as we deem to be necessary to a proper determination of this case.

The facts necessary to an understanding of this case are partially set out in case # 852, Territory of New Mexico vs. Santa Fe
545 Pacific R. R. Co., heretofore decided at this term of court; and while that was a case concerning the collection of taxes in Bernalillo county, the intervention in this case was filed in the same main suit as that, being for the foreclosure of the Atlantic and Pacific Railroad Co. We will therefore only add here such additional facts as appear to be necessary to make the case clear.

This is the third intervening petition mentioned in that case and is for taxes claimed to be due for the years 1892 to 1896, inclusive, on additional assessments made by the collector of Valencia county on the improvements on the right of way of the Atlantic & Pacific R. R. Co. in Valencia county.

The additional assessments set out that thirty-three miles of the right of way *was* over what was public domain of the United States when said right of way was granted, and 60.7 miles of the right of way *was* over land which was held in private ownership at the time of the grant of said right of way, which was made by act of Congress approved July 27th, 1866.

On being taken to the Supreme Court of the United States the decree of the territorial supreme court declaring the tax as illegal was affirmed (172 U. S., 186), but on rehearing the judgment was reversed. New Mexico vs. United States Trust Co., 174 U. S., 545.

We are bound in deciding this case by the mandate of the Supreme Court of the United States when it reversed and remanded it. That mandate was as follows: "The judgment of the supreme court of the Territory must be reversed and the cause remanded for further proceedings in accordance with this opinion."

546 We are equally bound by the findings of fact made by the United States Supreme Court as by its conclusions of law, and shall follow them, unless it manifestly appears to us that the Supreme Court was misled in arriving at any of the facts. The additional assessments made by the collector were on 60.7 miles of road as being over lands held in private ownership at the time of the grant to the railroad, while the Supreme Court finds that 66.7 miles of said road were over such land. We think that the learned judge who heard this case below would have been perfectly justified in holding in accordance with the decision of the Supreme Court of the United States as to the number of miles of said road which were taxable, and he probably would have done so, but on the case coming back to the district court for further proceedings, in accordance with the decision, an agreed statement of facts was signed by the counsel for the respective parties, by which it appears that only 55.5 miles of said railroad ran over lands held in private ownership at the time the grant was made by the act of Congress. The trial judge therefore held, and we think properly, that only that portion of the railroad which actually ran over land held in private ownership at the time the grant was made was taxable, and he modified the decision of the Supreme Court of the United States to that extent, believing that that court must have been misled in making its

finding that 66.7 miles of the road ran over lands held in private ownership.

The appellant argues at great length that at the time the railroad was built it did not know that any of its right of way was over property held in private ownership. We do not, however, think that this makes any difference as to the taxing of that part of the road which it was subsequently found was built over lands owned by private parties at the time of the making of the grant. What the charter of the road exempted from taxation was "the right
547 of way through the public lands." Congress did not grant a right of way through any specific land, but only through the public domain. The charter to the railroad company gave nothing through the lands which had previously been confirmed by Congress. They had already been declared by that body not to be part of the public domain. Whatever may have been their previous title—whether good, bad, or indifferent—Congress made a good title by its action in confirming them. Langdeau *vs.* Haynes, 88 U. S., 221; U. S. *vs.* Percheman, 7 Pet., 51:

By the confirmation of the other grants by the land court created by Congress since the authority to build the railroad was granted our Government has authoritatively declared that it never had any title to the land embraced within them, or, in other words, it has declared that the private Spanish land grants which have been confirmed were never a part of the public domain, as such confirmed grants were not a part of the public domain of the Republic of Mexico at the time of the signing of the treaty of Guadalupe Hidalgo, having been previously conveyed or donated to private persons. Congress by the act of 1866 did not undertake to grant any land except that which was the property of the General Government. As to other land held in private ownership it gave the company the right of eminent domain. The several private land grants through which the railroad runs, which have been confirmed either by act of Congress or by judgment of the court of private land claims, are not public lands; they are owned by private individuals, and consequently the right of way over them is subject to taxation by the Territory, as Congress only exempts from taxation within the Territories that part of the right of way which passes over public domain.

The Supreme Court of the United States says in New Mexico *vs.* U. S. Trust Co., 174 U. S., 545: "Our conclusion was ex-
548 pressly based on the terms of the statute, and we took care to affirm the rule of construction which had been announced many times and in many ways, that the taxing power of the State is never presumed to be relinquished unless the intention be expressed in terms too clear to be mistaken. If a doubt arise as to the intention of the legislature, that doubt must be solved against exemption from taxation.

"Applying this rule to the act of July 27th, 1866, c. 278, the exemption from taxation must be confined to the right of way granted by the United States by section 2 of the act, and to the superstructures which become a part of it, and not to the right of way which

the railroad company may have acquired under section 7, or independently of that section. Section 1 creates the corporation and authorizes it to construct and maintain a continuous railroad and telegraph line from and to certain points, and invests the company with the powers, privileges, and immunities necessary to effect that purpose. Section 2 provides: 'That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic & Pacific Railroad Company * * * for the construction of a railroad and telegraph line as proposed. * * * Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, * * * and the right of way shall be exempt from taxation within the Territories of the United States,' 14 Stat., 292.

"The right of way which is granted and the right of way which is exempt from taxation is precisely identified by the natural and first meaning of the words used and their relations. It would require an exercise of construction to extend the exemption,
549 and even if there are reasons for it, there are certainly reasons against it, and in such conflict the rule requires that the latter shall prevail."

We therefore hold that the right of way and the improvements thereon on 55.5 miles of the railroad in the county of Valencia was and *is* subject to taxation.

Appellant also makes objection to the assessments for the several years having been made by Solomon Luna, collector of Valencia county, claiming that he, as such collector, had no right or authority to extend them on the tax-rolls of Valencia county for the year 1896, for the several years, or to extend any levy of taxes against such assessment. We can see nothing in this contention of the appellant. Section 4056 of the Compiled Laws of 1897 gives the collector of any county, after the tax-list has been delivered to him, when he ascertains that any real estate or any personal property then in his county are omitted from the tax-list, to list, value, and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax-lists.

We think that on its face this statute shows the purpose for which it was enacted. It was evidently the intention of the legislature when it was passed to provide a means by which any property which was overlooked by the assessor when making up his tax-lists might be placed on the assessment-roll by the collector when he ascertained that the omission had been made. The act is a reasonable and proper one, as the intention of our laws is that all property which is liable to taxation shall bear its fair proportion and share of the public burdens.

It is idle to claim that the collector after having extended the assessments on the tax-rolls had no right to extend any levy of taxes against such assessments, nor do we see any reason why the
550 attachment of a typewritten paper containing the assessment to the tax-list at the proper place is not entering the same on the tax-roll. We think that it is.

One of the errors reserved by the appellant is that the court com-

mitted error in holding that Frank W. Clancy, Esq., had sufficient authority to authorize him to file the intervening petition in this case in the name of and on behalf of the Territory of New Mexico.

We do not consider this point as well taken in view of the statutes on this subject. Section 4157 of the Compiled Laws of 1897 provides that whenever, in his judgment, it may be proper the attorney general, district or county attorney, shall bring suit in the name of the Territory for the recovery of taxes which may be due, when the amount exceeds one hundred dollars.

From this statute it is apparent that all suits for the collection of taxes must be brought in the name of the Territory. There is no law, so far as we are aware, which permits this class of cases to be brought in the name of the county, or in any other name save that of the Territory. The bringing of this class of cases is, of course, a matter entirely within the control of the legislature. It might designate any person to take charge of this class of litigation, and if it had not designated any one else, then the contention of the appellant would be well founded; but the legislature did see fit to designate others, and the legislature of 1897, by an act which appears as section 649 of the Compiled Laws of 1897, allowed the county commissioners of any county which might be interested in prosecuting any suit for the collection of taxes to employ special attorneys and counsel, at a compensation not to exceed that named in the act. The act further provided that the employment should include all proceedings in the cause in the district and supreme court- of the
551 Territory and on appeal or error from the supreme court of the Territory to the United States court of appeals or to the Supreme Court of the United States.

The agreed statement of facts shows that Mr. F. W. Clancy was employed as special counsel by the county commissioners of Valencia county under this act to prosecute this suit. The act provided that the employment should include all proceedings in the cause in the district and supreme court- of the Territory as well as in the United States court of appeals and the Supreme Court of the United States. Surely the filing of the intervention was a part of the proceedings in the case and a very important part, as it began the litigation on which the remainder of the proceedings are based. The act of 1897 furthermore did not attempt to change in any manner section 4157 of the Compiled Laws of 1897, which provided that suits for the collection of taxes should be brought in the name of the Territory. We can see nothing in the contention of the appellant that the court committed error in allowing Mr. Clancy to file the intervening petition in the name of the Territory. To hold otherwise would, in our opinion, be putting a forced construction on the act of 1897, which was undoubtedly passed so that suits for the collection of taxes claimed to be delinquent might be vigorously prosecuted.

The amended motion to dismiss and the plea in abatement are substantially based on the same grounds and were filed by the appellant on the same day, to wit, September 27th, 1897. Part of the grounds on which they were based we will now consider, and those

which relate to the right of Mr. F. W. Clancy to file the intervening petition in the name of the Territory we have already discussed.

The main ground on which both the motion to dismiss and the plea in abatement are based is that the receiver of the
552 railroad was discharged on or about April 26th, 1898, and since such discharge has had no funds in his hands to answer any judgment which might be recovered against him as receiver; that at the time of the filing of the intervening petition all of the property in the hands of the receiver had been sold and conveyed to third parties under a decree of court, and that the parties to whom the conveyance had been made had not been made parties to this proceeding, and that the claims and demands set out in the intervening petition had never been presented to the parties who purchased the property sold under the decree of foreclosure in this case or their assigns, and that no notice was ever given to such purchasers or their assigns that any such claim or demand would be filed by the Territory in this case prior to the filing of the intervening petition herein, and that neither said purchasers nor their assigns ever refused any payment thereof upon any demand or otherwise, and that the United States Trust Company, at the time of the filing of the interplea, had not and never since has had any interest in the subject-matter of this intervening petition.

The authorities of Valencia county have been persistent in their efforts to collect the taxes which they claim are due from this railroad. They first filed an intervening petition as far back as June 4th, 1894, in a suit brought by the Mercantile Trust Company of New York, in which suit receivers of the road were appointed, and apparently have ever since honestly endeavored to collect what they claimed was due their county, either in that case or in the present one.

It furthermore appears in the record and is uncontradicted that at the time of the presentation to the court of the report of the foreclosure sale, when the confirmation of the same was asked for, and while at least two of the three purchasers of the property were
553 present, Mr. Clancy stated that arrangements had been made for his employment by the counties of Bernalillo and Valencia to prosecute claims for taxes against the property sold, and that at his suggestion and with the assent of the purchasers the following words were inserted in the order confirming the sale: "Including also any taxes which may finally be adjudged to be a lien upon the property and sold under the decree aforesaid."

It cannot therefore be contended that the purchasers of the property sold under the decree of foreclosure did not have notice of the claim for taxes made by Valencia county or that they took title to the property without knowing that such claim was to be made. The foreclosure sale took place May 3rd, 1897, and shortly after such sale the attorney for the appellants, who had been fighting the claims for taxes since the first attempt had been made to collect them some years before, was employed by the purchasers to attend to any pending or future litigation against the receiver; that service of the intervening petition was made at his office in Albuquerque

on June 10th, 1897, and a letter on the subject was mailed to him, addressed at Los Angeles, Cal., on the same day; that on June 23rd, 1897, he filed pleas to the intervening petition, and that ever since July 1st, 1897 (that being the day the new company took possession of the property), he has been in charge of all the legal business of that company in New Mexico. The statement made in both the motion to dismiss and the plea in abatement, that the receiver was discharged on or about April 26th, 1898, is not borne out by the facts as shown in the record, the record showing, on page 181, that the said receiver was discharged October 4th, 1898.

We cannot agree to the proposition of the appellants that the parties to whom the railroad was sold should have been made
554 parties to this proceeding, and we know of no way by which under the petition of intervention the petitioner could have made them parties. This is a proceeding *in rem*, begun when the property was in the hands of the court, and any one receiving it from the court took it *cum onere*. In addition to this the court at the time the order confirming the sale was filed retained jurisdiction of the cause and reserved full power to retake and sell the property if the purchasers, their successors or assigns, should fail to comply with any order of the court in respect to the payment of prior indebtedness, obligations, or liabilities.

No one was injured by the manner in which the notice was given, and it is evident that all of the parties in interest knew of the proceeding, and that such of them as desired contested the same.

The making of the demand on the purchasers for the payment of these taxes would have been a useless formality, for both they and their predecessors and successors have always refused to pay them and have vigorously fought their collection, and are doing so even at the present moment. If the purchasers of the property had desired to settle these taxes they could have paid the money into court.

Furthermore, as late as December 19th, 1898, on motion of the Santa Fe Pacific Railroad Company, an order was made by the court allowing creditors of the receivers or of the Atlantic & Pacific Railroad Co. to file their claims with the clerk of the second judicial district court on or before October 23rd, 1899.

The motion to dismiss and the pleas in abatement having been overruled, the appellants filed demurrers to the petition of intervention, setting up various grounds, and a hearing being had, the court sustained the demurrer as to the taxes levied on that portion of the right of way and improvements thereon in the
555 county of Valencia, where the same runs over what was public domain of the United States when said right of way was granted to the Atlantic & Pacific Railroad Co., and also as to the taxes levied upon the several depots, station-houses, etc. The court further reserved its decision until the final hearing of the case as to that part of the demurrer concerning that portion of the intervening petition claiming interest to be due upon any of the taxes sought to be recovered, and overruled the demurrer as to the taxes levied on that portion of the right of way and the improvements thereon

where it runs over lands which were held in private ownership at the time of the grant of said right of way to the railroad.

This decision seems to us to be a proper one, and is strictly in accord with the decision of the Supreme Court of the United States in the case of New Mexico *vs.* United States Trust Company, 174 U. S., 545. These are the same assessments which went to the Supreme Court of the United States when this case was there before, and that court then held that (at least some of) the objections to it were technical, We do not think that the additional objections raised by these demurrers are anything but technical.

An assessment of property is void when the valid portion, if any, of the tax cannot be separated, but not so when it is separable. This has been so held by the Supreme Court in People *vs.* R. R. Co., 127 U. S., 1; Santa Clara *vs.* R. R. Co., 118 U. S., 394. Appellant contends that if the assessment was made on 60.7 miles of road as running over private property, and there were only 55.5 of such miles, that then the assessment is void. We do not think that this is the law. When the assessment was made appellants could have appealed, and they clearly had the right and the opportunity to do so. They did not do so, however. As before intimated in this opinion, we think that the judge would have
556 been justified in view of the finding made by the Supreme Court in New Mexico *vs.* U. S. Trust Co., 174 U. S., 545, in holding against the railroad company for the taxes on 66.7 miles instead of on the number of miles he did. It will be observed that the assessment is at the rate of $6,500 per mile; consequently there is not the least trouble in ascertaining the amount of the assessment. The rule of law, as above stated, is that an assessment of property is void when the valid portion, if any, of the tax cannot be separated, but not so when it is separable. Part of this tax is clearly valid—that is, that part which is laid on the right of way when it runs over property which was held in private ownership at the time the grant to the railroad was made. The agreed statement of facts shows how many miles there were of such right of way, to wit, 55.5 miles, and multiplying this amount by the sum of $6,500 we arrive at the amount on which taxes should be levied for the several years, to wit, $360,750.00. We do not think that this is such error as would justify us in reversing and remanding this case, and if we did so we would do it with instructions to the court below to allow proper amendments to be made. Courts of equity regard substance, not form, and even at law a case will not be reversed where "the result is right, although the manner of reaching it may have been wrong." Decatur Bank *vs.* St. Louis Bank, 21 Wall., 301; Allis *vs.* Life Ins. Co., 97 U. S., 145; Gregg *vs.* Moore, 14 Wall., 569; Cannon *vs.* Pratt, 99 U. S., 623; Hornbuckle *vs.* Stafford, 111 U. S., 394. The valuation of $6,500 per mile was fixed by the territorial board of equalization at a meeting held pursuant to law, and we do not think it excessive. No appeal was taken from this action fixing the valuation, and therefore the owners of the property are bound by it. Albuquerque Bank *vs.* Perea, 5 N. M., 673; Albuquerque Bank *vs.*

Perea, 147 U. S., 89. This system of valuation is a proper one. R. R. Co. *vs.* Backus, 154 U. S., 421.

557 After the demurrer was overruled a lengthy plea in bar was filed, which occupies some ninety printed pages of the transcript of record. This plea set out everything which had been included in the motion to dismiss—pleas in abatement and demurrers—and also sets up practically everything which could have been put in an answer. The learned judge, however, overruled it, and then an answer was filed and the cause went to a hearing on the agreed statement of facts, and on this hearing judgment was entered in favor of the Territory, and from the amount of this judgment and the interest charged thereon appellants appealed and assigned errors thereon, as did also the cross-appellant. We will consider these alleged errors relating to the amount of the judgment and the interest charged thereon later in this opinion, as those assigned by both parties can be considered together.

The first four errors assigned by the cross-appellant relate to errors alleged to have been committed by the court in permitting appellants, after the case was remanded, to file a motion to dismiss while pleas in bar were pending and undisposed of, and also in the withdrawal of the plea filed in June, 1897. Cross-appellant also allege error in permitting appellees to file pleas raising the question as to the sufficiency of the assessments, and in denying the motion of the cross-appellant not to consider or admit in evidence the facts set out in the agreed statement of facts other than those specified and referred to in the statement in writing filed in the court below.

We think that no motion to dismiss after the case had been remanded from this court should have been permitted to have been filed until the pleas in bar then pending were disposed of. It certainly would have been the better practice to have first disposed of the pleas in bar before allowing the motion to dismiss to be filed, but as the motion to dismiss was overruled, as well as the

558 pleas in bar, we do not think that the cross-appellant suffered any injury which would be sufficient error to authorize us in reversing this case and sending it back to the lower court on this ground. If we did do so the case would in all probability come back to us in very much the same shape it now is in, except that the pleas in bar would have been overruled before the motion to dismiss was filed. Neither the appellant, the appellee, or the cross-appellant would be in any other or better position than they are in now.

We see no error in the court below having permitted the withdrawal of the pleas filed in June, 1897, and allowing a new plea to be substituted in its place. As we understand it, the case of Territory of New Mexico *vs.* U. S. Trust Co., 174 U. S., 545, went to the Supreme Court on a plea. No answer, so far as the record before us shows, was filed by the appellant before the Supreme Court passed on the case. According to the old chancery practice an answer should have been filed with the plea. Our Code of Civil Procedure was not in force at the time the intervention was filed. It did not go into effect until August 1st, 1897; consequently it does not affect this plea.

The cross-appellant does not, however, seem to have taken advan-

tage of this oversight. If the answer had been filed with the plea, then the whole matter in controversy might have been passed upon by the Supreme Court; but as it was not, it necessarily follows that only such matters were passed upon as were before it on the plea.

The decision of the Supreme Court was, in effect, that the improvements on the railroad right of way were taxable when it ran over what was private property at the time the grant was made. We therefore think that the court was right in not allowing any more of the road to be taxed than that which was on private property and which the stipulation now on file in the case shows was 55.5 miles. We think that the plea filed by the railroad company in 1897 estops it from denying that a part of their road ran over such property.

559 As we understand the decision of the Supreme Court of the United States, it does not hold finally that the assessments made by the collector of Valencia county were valid, but it did hold that "the assessments on the superstructures, on so much of the right of way as was taxable, were not assessments of personal property, but were clearly assessments of real estate," and we therefore think that the district court was clearly correct in allowing the pleas to be filed which raised the question of the validity of the assessments.

Cross-appellant also contends that the court committed error in refusing to hold that appellant was entitled to recover taxes on 60.7 miles of railroad, but we do not think that there is anything substantial in this objection, as the agreed statement of facts shows that only 55.5 miles of the road *was* over private property, and although the assessment was made on 60.7 miles, it was made at the rate of $6,500 per mile, and, when once the number of miles liable to taxation is ascertained, it is but a question of computation to determine what the amount is. It would be unjust to assess the railroad on more of its right of way and improvements thereon than were on lands held in private ownership.

The assignment that the cross-appellant was entitled to recover the full amount of the levies made by the authorities of Valencia county in each of the years from 1892 to 1896, inclusive, is, we think, of some merit. The court below found that a deduction of three mills should be made from the levy made for the year 1895, and six mills from the levy made for the year 1896. These levies were made for the payment of judgments recovered against the county, and were made in consequence of mandamus proceedings, and presumably have been collected from the other tax-payers of the county.

560 Section 657 of the Compiled Laws provides that when a judgment is recovered against a county that no execution shall issue, but that the judgment shall be paid by the levy of a tax, as other county charges. The argument is that these levies were based upon judgments for warrants issued in payment of ordinary county expenses, and that by section 4021 of the Compiled Laws the county commissioners are limited as to the tax which they may levy for current county expenses. For just what county expenses they

were issued does not appear. It may have been to pay for keeping prisoners in jail, and unless it is shown by the record that at the time of their issuance the county of Valencia was in debt to a greater sum than is allowed by the act of Congress approved June 30, 1886, we think that they are a legal and valid claim against the county.

If, previous to the passage of the so-called Bateman act, chap. 42, Laws of 1897, the intent of the legislature was that no county could spend in any one year more than the amount limited by section 4021, why is any provision made for the collection of a tax to pay a judgment recovered against a county? Besides, these claims, having been merged into judgments, are not subject to collateral attacks in proceedings brought to enforce the payment of taxes levied, and in proceedings such as this it is improper for the courts to go behind the judgment to ascertain upon what it was based for the purpose of preventing its payment. We think that there was error in this holding of the court disallowing these levies, but, in view of the judgment which we propose to give in this case, it will not be necessary to send the cause back to the court below for correction.

The remaining errors assigned both by the appellant and the cross-appellant we will consider together, as they relate to the interest the judgment should bear and as to whether or not the statutory penalty of twenty-five per cent. for each year when no return was
561 made should be added, and also the date from which the judgment should bear interest.

First we will consider as to whether or not the Territory is entitled to recover the penalty of 25 % of the amount of the taxes for failure to make returns of the property assessed by the collector. It appears from the record that no returns of the property sought to be taxed were made by any one for the years 1892 to 1896, inclusive. Section 4035 of the Compiled Laws provides that if any person liable to taxation shall fail to render a true list of his property the assessor shall make out a list of the property of such person, and such person shall be liable, in addition to the tax so assessed, to the penalty of 25%, which shall be assessed and collected as a part of the taxes of such person.

In the case at bar no separate penalty was added by the assessor. He assesses the property at the rate of $6,500 per mile and adds to it no separate penalty of 25 % or any other sum. In the intervention the petitioner asks for no judgment for any such penalty. The prayer of the intervention is for the payment of the taxes, together with interest thereon. Nothing is said about any penalty. We cannot go outside of the amount of the assessment as made by the collector and add to it. We are not assessors. We must assume that the collector assessed the property fairly and that in such assessment he put in all that the county and Territory were entitled to The law reads that the person assessed shall be liable "to the penalty of 25%, which shall be assessed, etc." This, we think, clearly makes it the duty of the assessor or collector to assess the penalty, if any, at the time he makes the assessment. If he does not do so we do not think that we could legally add to the sum fixed by him.

His action is final and the Territory can, in our opinion, recover in this suit, exclusive of interest, no greater amount than that for which the assessment is made. In any civil case the amount of the recovery can be no greater than that claimed in the *ad damnum* clause of a writ or declaration.

562 Previous to the session of the legislature held in 1899 the laws of this Territory were to the effect that all taxes which became delinquent should bear interest from the date of their delinquency at the rate of twenty-five per cent. per annum. The section which provided for this rate of interest was No. 4066 of the Compiled Laws. The legislature, at its January session in the year 1899, amended the tax laws of this Territory, and passed a new and stringent law to facilitate the collection of taxes (chap. 22, Session Laws of 1899). By this act section 4066 of the Compiled Laws was amended so as to do away with the imposition of interest at the rate of twenty-five per cent. per annum, and provided for interest at a different rate on taxes which were delinquent.

We regard the 25 % interest to be charges against taxes which were delinquent as being a penalty imposed by the legislature to facilitate the payment of taxes, and not as a payment for the use of the money withheld by the delinquent tax-payer. We hold, in accordance with many authorities, that a statute repealing an earlier law imposing a penalty, without a reservation as to penalties already accrued, will operate to destroy all right to the recovery of such penalties, even in cases pending at the time of the repeal. Section 34 of chap. 22, Laws of 1899, also provides that "the time for the payment of all taxes now delinquent is hereby extended until May 1st, 1899, and when the same may be in litigation at the date of the passage of this act until such litigation shall be determined." This law (chap. 22, Laws of 1899) was approved March 1, 1899, nearly two years after the filing of the petition of intervention on which this suit is based, so there can be no doubt but that this claim was in litigation at the time of the passage of this act, and that consequently the imposition of interest at the rate of 25 % per annum on the delinquent taxes was expressly waived.

563 We are aware that the same legislature at a subsequent day, March 16, 1899, passed an act known as chap. 52, Laws of 1899, by which it provided that all accrued penalties and interest on taxes delinquent should be remitted if they were paid by July 1st, 1899, and furthermore provided "that in all cases where taxes are now the subject of litigation the time for such payment as aforesaid is extended only to the first day of July, 1899, and if not paid on or before such first day of July, no abatement of interest or penalties shall thereafter be made." Interest at the rate of 25 % per annum on delinquent taxes having been repealed by the amendment of section 4066, Compiled Laws, by section 10 of chap. 22, Laws of 1899, and chap. 52 of the Laws of 1899, not having provided for any rate of interest, we do not see how we would be justified in holding that interest at the rate of 25 % per annum could properly be charged on such of the taxes in controversy as were delinquent, as the law allowing interest at that rate had been amended out of

existence. At most it seems to us that the greatest extent to which we could go would be to charge interest at the statutory rate of 6 % allowed in this Territory when no agreement is made for a greater rate.

Even if the statute allowing interest at the rate of 25 % on delinquent taxes to be charged had not been repealed, we would be loth to impose interest at this rate in this case, for the reason that there was a *bona fide* dispute as to the legality of the taxes levied, and no one before the judgment was rendered in this case by the learned judge below could have separated the legal from the illegal taxes, as until that decision the number of miles of the railroad liable to taxation was not known. In Minnesota the statute authorizing the placing of back taxes on the assessment-rolls provides "that interest shall be charged up against them from the time that such taxes should have become delinquent if placed on the roll." The
564 *sillibi* made by the supreme court of Minnesota in the case of The State *vs.* Certain Lands in Redwood County, 42 N. W. Rep., 473, says "that the provisions of the act adding back interest to the tax is invalid as being unequal taxation, for the reason that until the amount of the tax is ascertained the owner has no opportunity of paying it and is not in default, and the person is chargeable with interest only, upon contract to pay it, or for some default of legal duty on his part."

The court below held that the delinquent taxes should bear interest at the rate of 6% per annum from the respective dates when they became delinquent—*i. e.*, one-half of the taxes levied and assessed under the levy made during the year 1892 to bear interest at the rate of 6% per annum from the first day of January, 1893, and the other half thereof to bear interest at the same rate from the first day of July, 1893, and so on in like manner for each of the years for which the additional assessments were made. We think that this was error and that interest should only have been charged from the date of the rendition of the judgment, to wit, October 5, 1899. In the case of *In re* Taxes in Hennepin County *vs.* Baldwin, 65 N. W., 82, the court says:

"The sixth and last question is whether the delinquent taxes charged against this land bear interest, and, if so, at what rate and from what date? A tax is not founded on contract or agreement. It operates *in invitum*. In its essential characteristics it is not a debt or in the nature of a debt. Hence, while a debt bears interest from its maturity, a tax never bears interest either as interest or as damages for its non-payment, except by force of statute. This proposition is so elementary that the citation of authorities in its support can hardly be necessary. See, however, 1 Suth. Dam., sec. 337; 1 Sedg. Dam., sec. 332, and cases cited."

565 This we believe to be the correct law. A tax operates *in invitum*, and unless provided for by statute will not bear interest from the time it becomes due. Our laws provide that judgments shall bear interest at the rate of 6 % per annum; consequently we hold that the judgment in this case should only bear interest at that rate and from the date of its rendition, to wit, October 5th, 1899.

This case has been before us before and has been twice argued in the Supreme Court of the United States, and we desire to facilitate its determination at as early a day as possible. We have found two errors on which we might reverse and remand it, one relating to the deduction of the taxes levied for paying judgments and the other relating to the charging of interest on the *delinquent taxes from the* dates they severally became due, instead of from the date of the judgment. The assessments for each year appear in the record, and the rate- of taxation for the several years are also there; consequently it is but clerical work to figure what they amount to in each year, the tax being on 55.5 miles at $6,500 per mile. It is as follows, to wit:

Assessment for—	Amount.	Rate.	Tax.
1892	$360,750.00	.0219	$7,900.43
1893	360,750.00	.0375	13,528.12
1894	360,750.00	.03675	13,257.56
1895	360,750.00	.03675	13,257.56
1896	360,750.00	.03875	13,979.06
			$61,922.73

Which sum of $61,922.73, bearing interest at the rate of 6 % per annum from October 5th, 1899, is the amount for which we think the learned judge below should have given judgment. The judgment given by him in favor of the appellee and cross-
566 appellant was for the sum of $74,168.70, which sum was arrived at by deducting the levies for the payment of judgments of three mills in the year 1895, and six mills in the year 1896, being the years referred to above by us, and which from the record before us we think were legal, and by charging interest at the rate of six per cent. per annum on the delinquent taxes from the several dates they became payable to the date of the judgment. We think this judgment is excessive on account of the manner in which interest is charged, but on account of the delay which it would occasion we see no reason to remand this case to the district court to have a judgment entered in accordance with this opinion, as, under section 3141 of the Compiled Laws of 1897, this court has power to "award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to them shall seem agreeable to law." The judgment of the district court is therefore modified and reduced to the sum of $61,922.73, which sum shall bear interest, at the rate of 6 per centum per annum, from October 5th, 1899, and as thus modified the judgment of the court below is affirmed.

WILLIAM J. MILLS,
Chief Justice, etc.

We concur.

FRANK W. PARKER, *A. J.*
JOHN R. McFIE, *A. J.*

Crumpacker, A. J., having heard this case below, did not participate in this opinion.

Leland, A. J., absent on account of sickness.

567 TERRITORY OF NEW MEXICO, } ss:
Supreme Court, }

I, Jose D. Sena, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a true, full, and perfect transcript of the record, assignments of error, and all of the proceedings had in two certain causes lately pending in said court, wherein The United States Trust Company of New York and C. W. Smith, receiver of the property of the Atlantic & Pacific Railroad Company, were appellants and cross-appellees and The Territory of New Mexico was appellee and cross-appellant, together with the opinion of the said court in said causes and the certificate made by said court and signed by the chief justice thereof.

In testimony whereof I have hereunto set my official hand and the seal of the said supreme court of the Territory of New Mexico this 13th day of October, A. D. 1900.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

568 In the Supreme Court of the Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.
vs.
TERRITORY OF NEW MEXICO. } No. 853.

TERRITORY OF NEW MEXICO
vs.
THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL. } No. 854.

It is hereby agreed by and between the parties to the above-entitled causes that no advantage will be taken on either side of any failure to file in the office of the clerk of the Supreme Court of the United States a transcript of the record upon the respective appeals of the said parties within sixty days after the time that said appeals were taken, provided that such record shall be filed and the appeal docketed in the Supreme Court of the United States on or before the 21st day of November, 1900.

F. W. CLANCY,
Counsel for the Territory of New Mexico.
C. N. STERRY,
Counsel for the United States Trust Company of New York and for C. W. Smith, Receiver.

569 In the Supreme Court of the Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.
vs.
TERRITORY OF NEW MEXICO. } No. 853.

TERRITORY OF NEW MEXICO
vs.
THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL. } No. 854.

The United States Trust Company of New York and C. W. Smith, receiver, hereby waive the issuance and service of any citation upon the appeal of the Territory of New Mexico taken from the judgment of the supreme court of New Mexico in the above-entitled causes to the Supreme Court of the United States, and agree to enter their appearance in the last-named court when said appeal is docketed therein.

C. N. STERRY,
Counsel for the United States Trust Company of New York and for C. W. Smith, Receiver.

Endorsed on cover: File No., 17,945. Territory of New Mexico supreme court. Term No., 460. The United States Trust Company of New York *et al.*, appellants, *vs.* The Territory of New Mexico. File No., 17,946. Term No., 461. The Territory of New Mexico, appellant, *vs.* The United States Trust Company of New York *et al.* Filed October 27th, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

THE TERRITORY OF NEW MEXICO, APPELLANT, v. THE UNITED STATES TRUST COMPANY OF NEW YORK, ET AL.	No. 461.
THE UNITED STATES TRUST COMPANY OF NEW YORK, ET AL., APPELLANTS, v. THE TERRITORY OF NEW MEXICO.	No. 460.

Now comes the Territory of New Mexico and moves the Court to consolidate the above entitled two causes for

argument in this Court as a single case, and to advance the same for hearing on the earliest practicable day at the present term of the Court, for the following reasons:

1. The appeal in each of said cases is taken from the same judgment and decree of the Supreme Court of New Mexico.

2. The case in which the said appeals are taken has been heretofore adjudicated by this Court upon the merits, in part at least, as will appear by reference to the case of New Mexico *v.* United States Trust Company, 174 U. S. 545, although the appeals, as now presented, involve new and additional questions.

3. Matters of general public interest are presented by these cases, as there is raised the question of the right of the Territory of New Mexico to recover large amounts of money for taxes levied upon the property of the Atlantic and Pacific Railroad Company as to which an exemption is claimed by virtue of the provisions of the act of Congress, approved July 27, 1866, entitled "An Act "granting lands to aid in the construction of a railroad "and telegraph line from the States of Missouri and Ar- "kansas to the Pacific Coast."

4. If the contentions of the Territory are sustained by this Court, the amount of such taxes with the interest thereon will amount to nearly two hundred thousand dollars by the time a decision can be reached in this Court even if the cases be advanced, and it is consequently of great importance to the said Territory to have such decision at the earliest possible day.

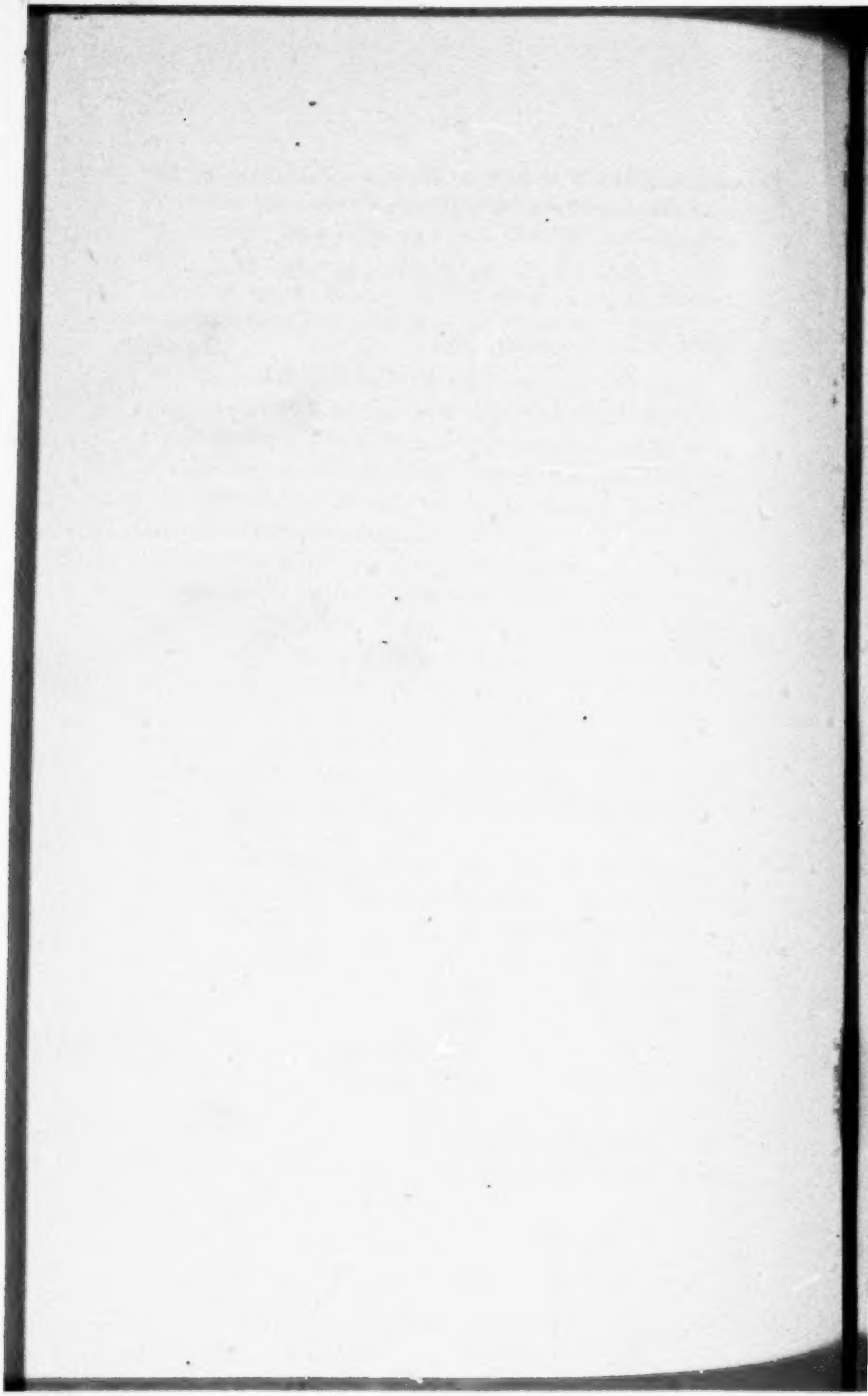
5. It is contended by the Territory that it is entitled to recover the said taxes with interest at the rate of twenty-five per centum per annum, and if this contention is sustained it is only fair to the owners of the property that

the decision should be had as soon as possible so as to stop the running of such a high rate of interest.

F. W. CLANCY,
Solicitor for the Territory of New Mexico.

I unite in the foregoing motion.

C. N. STERRY,
Solicitor for United States Trust Company of New York, et al.



No. 181.

Brf. of Sterry, Kenna & Dunlap

Office Supreme Court U. S.
FILED
OCT 22 1901
JAMES H. McKENNEY

For Appellants.

IN THE

Supreme Court of the United States.

Filed Oct. 22, 1901.

OCTOBER TERM, A. D. 1901.

No. ~~400~~ 181.

THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W. SMITH,
Appellants,

vs

THE TERRITORY OF NEW MEXICO,
Appellee.

BRIEF OF APPELLANTS.

C. N. STERRY,
SOLICITOR FOR APPELLANTS.

E. D. KENNA,
ROBERT DUNLAP.
OF COUNSEL.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 460.

THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W. SMITH, *Appellants,*

vs

THE TERRITORY OF NEW MEXICO, *Appellee.*

STATEMENT.

Statement of the case prior to its reinstatement in the court below.

While this case has previously been before this court, upon an appeal by the Territory of New Mexico (172 U. S., 171; 174 U. S., 543), none of the questions presented by the present appeal were involved in such prior appeal, and, therefore, were neither presented to nor considered by this court upon its former hearing of the case. The present record discloses the following facts:

The Atlantic and Pacific Railroad Company was incorporated by the Act of Congress approved July 27, 1866 (14 U. S. Stats., p. 292); subsequently, in 1879 and 1880,

that company constructed that portion of its railroad which ran from Isleta Junction, in the Territory of New Mexico, to the west bank of the Colorado river, in the Territory of Arizona, along the line fixed by its charter, a distance of about five hundred and seventy (570) miles. This part of its railroad was located and constructed through a portion of only two counties in New Mexico, to-wit, Bernalillo and Valencia. The total distance of the line in the two counties being about one hundred and seventy-four (174) miles, ninety-two (92) miles of which was in the County of Valenica, and the balance in the County of Bernalillo.

This company, in 1882, leased from the Southern Pacific Railroad Company a line running from a connection with its road at the west bank of the Colorado river to Mojave, in the State of California, a distance of some two hundred and forty-two (242) miles, and thereafterwards operated its line, and this leased line, as one line of railroad, from Albuquerque to Mojave. This line of railroad, and all the property of the company connected therewith, was known and called the Western Division of the Atlantic and Pacific Railroad Company.

In January, 1894, the Mercantile Trust Company of New York (being the trustee in a second mortgage given by the Atlantic and Pacific Railroad Company on all of its property pertaining to this western division, to secure bonds to the amount of $5,000,000) commenced four actions to foreclose its mortgage; one in the District Court of the Second Judicial District of the Territory of New Mexico (this being the district within which all the railroad and other property of the company in the Territory of New Mexico was situated); one in the District Court of the Fourth Judicial District of the Territory of Arizona

(this being the district in which all the line of the road and other property of the company in Arizona was situated); one in the United States Circuit Court for the Southern District of California (that being the district in California in which it was operating a railroad); and the other in the Circuit Court of the United States for the Northern District of California. The railroad company was the sole defendant in each of these actions; and it having entered its appearance in each action, each court wherein these actions were pending, upon application by the trust company and notice to the defendant, appointed three receivers to take possessoin of and operate the property which was covered by the mortgage sought to be foreclosed. These receivers (being the same persons in each jurisdiction), having qualified, took actual possession early in January, 1894, of all the line of railroad mentioned, and all the other property belonging to the railroad company in each of the jurisdictions named, and continued in possession of the same, operating the railroad, until the first of February, 1896. In January, 1896, the United States Trust Company of New York, the trustee in the first mortgage executed by the Atlantic and Pacific Railroad Company (under the act of Congress approved April 20, 1871; 17 U. S. Stats., p. 19) upon all of its property (pertaining to the western division), to secure the sum of $16,000,000 in bonds, commenced a suit to foreclose its mortgage, in each one of the courts above mentioned.

In the actions commenced by the United States Trust Company, the railroad company, the Mercantile Trust Company and the receivers appointed in the actions commenced by the last named company, and others, were made parties defendant. In these last actions, each of the courts wherein the same were pending appointed C. W. Smith receiver, to

take possession of all the property belonging to the railroad company, which was then in the possession of the receivers appointed in the actions commenced by the Mercantile Trust Company, and ordered the receivers in the Mercantile Trust Company case to turn the property in their custody over to Mr. Smith, on or before February 1, 1896, subject to the liabilities and obligations incurred by them as receivers. These orders practically extended the former receivership to these last cases, substituting Mr. Smith for the other receivers, who resigned after delivering the property in their custody to Mr. Smith. The defendants having been served, or appearing in the cases, a hearing was had, and a final decree entered in each case, in favor of the plaintiff, the United States Trust Company, and against the other defendants. The final decree entered in the District Court of New Mexico was entered on April 10, 1896, and subsequently the same decree was entered in each of the other courts; the New Mexico court being treated by each of the other courts as the court of primary jurisdiction. The decree entered in the District Court of New Mexico provided, among other things, that all the property pertaining to the western division of said railroad company, including the franchise, should be sold at public auction, upon certain terms and conditions, stated in the decree. On the third day of May, 1897, in accordance with the terms of the decree entered in that court, the special master named in the decree sold all of the property decreed to be sold to A. F. Walker, R. Somers Hayes and Victor Morawetz; on May 4, 1897, this sale was confirmed in the New Mexico court; subsequently, in May, 1897, the sale was confirmed in each of the other courts. On June 2, 1897, in accordance with the terms of the final decree and the decere of confirmation entered in each court, the special

master executed and delivered a deed conveying to the purchasers all the property sold. On June 22, 1897, the grantees in the special master's deed conveyed all the property sold and conveyed to them to the Santa Fe Pacific Railroad Company, a corporation created under the act of Congress, approved March 3, 1897. (29 U. S. Stats., p. 622.)

On June 10, 1897, after the sale, confirmation and conveyance by the special master to the purchasers, the so-called intervening petition under consideration was, without notice to any of the parties or the purchasers, but by leave of court, filed in the action commenced by the United States Trust Company in the District Court of the Second Judicial District in New Mexico. This intervening petition prayed for an order upon the receiver to pay certain taxes claimed to be due Valencia County, New Mexico, alleged to have been levied upon the right of way of the railroad, sold under the decree, and the improvements placed thereon, being the sum of thirteen thousand five hundred and eighty-six dollars and fifty-four cents ($13,586.54), for 1892; twenty-three thousand and sixty-four dollars and sixty-three cents ($23,064.63), for 1893; twenty-three thousand and twenty dollars and sixteen cents ($23,020.16), for 1894; twenty-three thousand and twenty dollars and sixteen cents ($23,020.16), for 1895, and twenty-four thousand two hundred and seventy-two dollars and ninety-two cents ($24,272.92), for 1896.

The intervening petition alleged that these claims for taxes were based upon taxes placed by the collector upon the tax roll of that county for the year 1896, upon a claim of right to do so under the provisions of sections 2847 and 2848 of the Compiled Laws of New Mexico of 1884. (See Appendix.)

The court made an order requiring the United States

Trust Company and the receiver, Mr. Smith, to show cause on or before June 22nd why the prayer of this intervening petition should not be granted. Pursuant to the order of the court the United States Trust Company and the receiver filed their certain joint and several pleas in bar to this intervening petition, and the same were at once set down for argument, but the court refused to hear any argument on the sufficiency of the pleas, and peremptorily dismissed the intervening petition, on its own motion, on the 23rd day of June, 1897. An appeal was taken by the Territory to the Supreme Court of the Territory, where the order dismissing the intervening petition was affirmed. An appeal was then taken to this court, and this court affirmed the order of dismissal (172 U. S., 171), but, on a motion for a rehearing, reversed the order. (174 U. S., 543.) Subsequently, upon a mandate from this court, the Supreme Court of the Territory set aside its judgment and issued a mandate to the District Court, and the District Court, on August 4, 1899, pursuant to the mandate, set aside the order dismissing the intervening petition and reinstated the case upon its docket for hearing. On the former hearing the transcript before this court failed to disclose the final decree, the fact of the sale, the decree of confirmation and other important facts which the entire record of the case at that time actually disclosed.

Statement of the questions presented by the appeal of C. W. Smith, as Receiver, and the United States Trust Company.

In October, 1898, Mr. C. W. Smith, having surrendered in July, 1897, to the assignee of the purchasers, the property sold, made his final accounting as receiver, and was discharged, as such, by the District Court in New Mexico. No other receiver having been appointed as his successor, it appeared upon the record, at the time of the reinstatement of the case, that the court had neither a receiver for or the custody of the property involved or any funds out of which the claims presented could have been satisfied. It also appeared from the record at this time that neither Mr. Smith nor the United States Trust Company had the slightest interest in the property which had formerly been in the custody of the court, through its receivers and receiver, and against which the taxes sought to be recovered were alleged to have been levied. When this case was called for hearing in the District Court of New Mexico, at its September 1899 term (the first term following its reinstatement), C. W. Smith and the United States Trust Company filed a joint and several amended motion to dismiss the intervening petition, upon grounds stated therein; among which were the grounds: that Smith had been discharged as receiver prior to the reinstatement of the case, and had no funds or property in his hands to answer any judgment that might be entered against him, in any official capacity, or otherwise; and that neither he nor the United States Trust Company had, at the time of the filing of the motion, any interest whatever in the subject-matter of the intervening petition; that all of the property concerning which it was sought to have the taxes

claimed declared a lien upon had been sold and conveyed to third parties, and placed in their possession; that no notice, or demand, had ever been made upon the purchasers, or their assignee, as required by the terms of the final decree and the decree of confirmation, for the claims or demands sued for; that the name of the territory was used in the intervening petition without right or authority, and that the intervening petition was unauthorized. This motion was supported by two affidavits, and two affidavits were filed in opposition. The motion was heard, on the day it was filed, and overruled. Each of the facts, stated in the motion to dismiss, as grounds for dismissal, either appeared fully upon the records in the cause, or was established by the affidavits filed. None of the facts stated in the motion were controverted by the affidavits filed in opposition to it. It appeared from the affidavits filed on behalf of the territory, in opposition to this motion, that each of the assessments of the property taxed, and each levy of taxes thereon, was made on June 7, 1897, after the property had been sold and conveyed to the purchasers. On the 27th day of September, 1899, Smith, as receiver, and the United States Trust Company obtained leave of the court, to withdraw their pleas, filed to the intervening petition on the 23rd day of June, 1897 (which appeared in the record when this case was previously here), and to file in lieu thereof a plea in abatement; this plea in abatement was immediately filed, and it set out the same grounds for abating the intervening petition as had been set forth in the motion to dismiss. This plea in abatement was set down for argument, and upon argument was, by the court, held insufficient in law and in equity to abate the matter presented by the intervening petition. The facts which were admitted by setting the

plea in abatement down for argument were, briefly: that Smith, as receiver, was finally discharged as such receiver on the 26th day of April, 1898, and that he, as such receiver, had no funds or property in his hands wherewith to answer any judgment that might be rendered on the intervening petition; that the United States Trust Company, at the time of filing the petition in intervention, had not, and had not since that time, any interest in the subject-matter of the intervening petition; that at the time of the filing of the intervening petition all the property in the hands of the receiver, and in the custody of the court, had been sold and conveyed to third persons, who were not, and had not been made, parties to the intervening petition; that none of the claims or demands stated in the intervening petition had ever been presented to the purchasers of the property that was sold under the decree and which was sought to be charged with the lien of the taxes claimed, and that no notice had ever been given to such purchasers, or their assignee, that any such demand or claim would be filed by the territory in the cause in which the same were filed, and that neither the purchasers nor their assignee had ever refused to pay any claim or demand for any claims stated in the intervening petition, and that the name of the Territory of New Mexico as used in the intervening petition, was used without any right, leave or authority.

Upon the overruling of the plea a joint and several demurrer, both general and specific, was filed by Smith and the trust company to the intervening petition. In this demurrer each claim for each year's taxes was generally and specifically attacked. This demurrer being set down for argument was, upon argument, partially sustained and partially overruled as to each claim; that is to

say, the court held that the intervening petition disclosed on its face that a certain portion of the property upon which the taxes were levied was exempt from taxation, and also held that those portions of the intervening petition seeking to recover penalties could not be sustained. The court overruled the demurrer as to all those portions thereof which attacked the intervening petition, in so far as it disclosed a levy of any taxes in any year upon the superstructure, on that portion of the right of way alleged to have been acquired over lands held in private ownership.

Upon the overruling of the demurrer Mr. Smith and the trust company filed their joint and several pleas in bar to each of the claims for taxes set out in the intervening petition, to which the demurrer had been overruled. While the plea in bar contained matters constituting several distince pleas, it was so drawn upon consent of the territory and leave of the court. This plea, in substance, set out the following facts: That the Atlantic and Pacific Railroad Company, up to January, 1894, and the receivers from that time until 1897, made each year at the proper time therefor returns to the assessor of Valencia County (as required by law) of all the property of the railroad company which it and they admitted was subject to taxation in such county. That in 1892 the returns made by the railroad company described its right of way, railroad and station grounds in this county, but claimed that the same were exempt from taxation under the second section of the Act of Congress of July 27, 1866. That the returns, after the year 1892, omitted the "right of way" and station grounds under the claim of the railroad company and its receivers that the same were exempt from taxation.

During the years 1892 to 1896, inclusive, the assessor of Valencia County at the proper time in each year, while the assessment rolls of the county for such year were in his possession and under his control, duly assessed all of the "right of way" and station grounds of the Atlantic and Pacific Railroad Company in Valencia County, and to such assessment the tax levies made in that county for such year were duly extended upon the current tax rolls in the manner required by law. The railroad company in 1893 and the receivers subsequent to that time refused to pay these taxes levied upon these assessments upon the claim that the entire "right of way" in that county was exempt from taxation. That at the time the collector took the action heretofore stated, each of the tax rolls for each of these years (which were then and had all the time been in his hands) disclosed to him, clearly and unequivocally, that the county assessor each year during the years 1892 to 1896, inclusive, *had assessed the very property claimed by him to have been omitted from the assessment rolls, and that the proper taxes had been extended each year upon the tax rolls against such assessments.*

It was further shown that the collector made these "additional assessments" upon the tax rolls of 1896, on June 7, 1897, at a time when the assessments rolls for 1897 were in the hands of the county assessor for the purpose of placing thereon, not only the property ordinarily to be placed thereon, but also for the purpose of placing thereon by him all property omitted from the assessment rolls of any previous year under the provisions of section 4055, *infra*. That the collector did all of this under the directions of the counsel employed by the county, who had been present at the confirmation of the sale, and who knew that the property had been sold under the final

decree of the court to third parties, and who had actual knowledge of the existing assessments and levies.

These pleas further disclosed that this same collector had been tax collector for Valencia County during each of the years involved, to-wit: from 1892 to 1896, inclusive, and that he had filed an intervening petition in the action pending in the same court on behalf of the Mercantile Trust Company (to foreclose its mortgage) to recover the taxes levied upon the assessment of the "right of way" and station grounds in Valencia County, for the years 1892 and 1893, and that this petition alleged that the assessments for each of these years were properly made, and that the taxes sought to be recovered had been properly levied; that this petition also alleged that a large part of the "right of way" assessed in each of these years was acquired by the railroad company over lands held in private ownership. This plea further disclosed that this intervening petition referred to was still pending and undisposed of in the case wherein it was filed. In other words, the plea disclosed that to the full knowledge of the collector who had attempted to act under the sections of the statute quoted, the very property which he placed upon the tax rolls of 1896 as property omitted from the assessment rolls of 1892 to 1896, inclusive, was upon such assessment rolls duly assessed with the taxes levied in the county extended to the same, upon the tax rolls for at least the years 1892 and 1893.

The plea further alleged the fact of the sale of the property on May 3, 1897, to the third parties named; the confirmation of the sale on the next day; the conveyance of the property by the master to the purchasers, on the 2nd of June following; the transfer of the property by the purchasers to the Santa Fe Pacific Railroad Company on the 22nd of the same month; that the property was de-

livered by Mr. Smith, as receiver, to the Santa Fe Pacific Railroad Company, as the assignee of the purchasers, on July 1, 1897; that no claim or notice was ever made or served upon the purchasers or their assignee of this assessment made on June 7, 1897, or of the levying of these taxes, on such assessments, and that no demand was ever made upon the purchasers or their assignee at any time for the payment of the taxes claimed; that the provisions of the final decree and the decree of confirmation with reference to the collection of claims and taxes against the property sold had not been complied with by the Territory of New Mexico, or for or on its behalf, or on behalf of Valencia County.

These pleas in bar were set down for argument, and upon hearing were held to be insufficient in law and in equity to bar the claims or demands contained in the intervening petition.

Upon the overruling of the plea in bar, the trust company, and Mr. Smith, as receiver, filed a joint and several answer to the intervening petition, which put in issue each of its material allegations. The case was then heard by the District Court, upon an agreed statement of facts made in writing, filed in the cause and made a part of the record. The facts disclosed in the agreed statement of facts were practically the facts set up in the plea in bar, together with a statement of the facts concerning that portion of the right of way which the territory claimed was acquired by the railroad company from private owners. In relation to this part of the right of way, the facts are, that prior to March 12, 1872, the company definitely located its line of road through New Mexico, and filed its map of definite location with the secretary of the interior on the 12th day of March, 1872, showing its line as located in the territory.

At the time of the definite location of this line none of the lands in Valencia County had been surveyed by the government or anyone else. The line, as located through that county, was upon land which consisted of high desert tablelands, hills and one or two small valleys; none of the land upon which the right of way was located passed over any cultivated, enclosed or occupied land in this county, except some small tracts cultivated by the Indians in the pueblos of Laguna and Acoma; that the railroad was finally built upon this line, as located, in 1879, and that at the time of the location of the line and the building of the railroad there was nothing, so far as the eye could see, from any part of the right of way to distinguish the land over which the right of way was located from any other wild, uninclosed, uncultivated, uninhabited and unsurveyed lands, except where it passed across the two pueblos referred to. On May 8, 1872, the commissioner of the general land office directed the register and receiver of the local land office at Santa Fe, New Mexico, to withdraw the entire amount of the ground granted to the Atlantic and Pacific Railroad Company along the line of its located road through the Territory of New Mexico; that immediately upon receipt of such letter all the lands on either side of the located line of railroad for a distance of forty miles were withdrawn by the local officers. At the time of the location of the line, and the building of the railroad, none of the officers of the railroad company had actual knowledge that the line of road, as located, was located upon any other than public lands belonging to the United States government; that none of the right of way in Valencia County was acquired by the railroad company, either by purchase, donation or condemnation, as the entire right of way was always claimed by the railroad company to have been acquired by the

grant contained in the second section of the Act of July 27, 1866. The agreed statement of facts further disclosed that fifty-five and one-half miles of the railroad crossed alleged Mexican grants, which, at the time of the location and building of the road, had not been segregated from the public lands of the United States by any survey or any other act; that each of these grants (except one of the Indian pueblos referred to) were established by the parties in actions brought against the government, in the Court of Private Land Claims, after the location and building of the road, the history of each grant being set out. Two of these grants were unheard of and unknown, even to the owners, until long after the assessment and levy of taxes in controversy. Prior to the decision of the Court of Private Land Claims, no one could have told where any of the boundary lines of the lands of any one of these grants were, and none of the officers of the railroad company, prior to the location and building of the road, had any actual or constructive knowledge of the fact that the right of way was over any of these grants. Thirteen miles of the right of way was over an alleged Spanish grant, known as the Antonio Sedillo, or Canada de los Apaches, grant. When this grant was confirmed in 1892 by the Court of Private Land Claims, the decree of confirmation provided that the station grounds of the Atlantic and Pacific Railroad Company, and its right of way two hundred feet in width, were excepted from the effect and operation of the confirmation, yet the court below, and the Supreme Court, in determining the amount of the right of way acquired from private ownership by the railroad company, included this thirteen miles. Upon the final hearing before the District Court, the District Court determined that taxes which had been sued for should be

paid upon fifty-five and one-half miles (with the improvements) of the right of way of the railroad of the Atlantic and Pacific Railroad Company. It was adjudged in the decree entered that the Territory of New Mexico should have and recover from the *owners* of this fifty-five miles of railroad the sum of seventy-four thousand one hundred and sixty-eight dollers and seventy cents ($74,168.70), together with the costs expended, and that such amount should be decreed to be a lien upon that portion of the railroad which constituted this fifty-five miles, and which was described in the decree. Mr. Smith, as receiver, and the United States Trust Company, were granted an appeal in open court to the Supreme Court of the territory. The Territory of New Mexico also took an appeal from this decree. These cases were heard by the Supreme Court of the territory together. The Supreme Court of the territory modified the judgment of the court below to the extent of making the amount of the recovery the sum of sixty-one thousand nine hundred and twenty-two dollars and seventy-three cents ($61,922.73), with interest from October 5, 1899, until paid, and rendered a judgment for that amount against the owners of the railroad, the judgment alleging that the Santa Fe Pacific Railroad Company was the owner of it. Otherwise the decree in the lower court was affirmed. From this decree, each party has appealed to this court.

The facts concerning the alleged Spanish and Mexican grants will be hereafter more fully set out in the argument on each one.

ASSIGNMENT OF ERRORS.

The appellees above named, jointly and severally, specify the following as the errors which they and each of them intend to rely upon in this court upon their joint and several appeal from the judgment heretofore rendered by the Supreme Court of the Territory of New Mexico in said case:

I.

The District Court of New Mexico erred in overruling the motion filed in that court September 27, 1899, by the said C. W. Smith, as late receiver, and the United States Trust Company, to dismiss said intervening petition.

II.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court last above referred to and in refusing to sustain the motion to dismiss said intervening petition.

III.

The District Court of New Mexico erred in holding the plea in abatement, filed on the 27th day of September, 1899, by C. W. Smith and the United States Trust Company, to the intervening petition, insufficient, and in overruling the same.

IV.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court, holding that the plea in abatement filed on the 27th of September, 1899, by C. W. Smith and the United States Trust Company, to the intervening petition of appellant, was insufficient, and the Supreme Court erred in not sustaining such plea in abatement.

V.

The District Court of New Mexico erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1892, by the collector of Valencia County, on the tax rolls for the year 1896; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

VI.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1892, by the collector of Valencia County, on the tax rolls for the year 1896; and the Supreme Court erred in not sustaining such joint and several demurrer to that portion of the intervening petition last above referred to.

VII.

The District Court of New Mexico erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1893, by the collector of Valencia County, on the tax rolls for the year 1896; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

VIII.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the joint and several demurrer of the appellees to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1893, by the collector of Valencia County, on the tax rolls for the year 1896; and the Supreme Court erred in overruling the said joint and several demurrer to said portion of said intervening petition.

IX.

The District Court of New Mexico erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1894, by the col-

lector of Valencia County, on the tax rolls for the year 1896; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

X.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1894, by the collector of Valenica County, on the tax rolls for the year 1896; and the Supreme Court erred in refusing to sustain such demurrer to such portion of said intervening petition.

XI.

The District Court of New Mexico erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550), for the year 1895, by the collector of Valencia County on the tax rolls for the year 1896, and erred in the overruling of each and portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

XII.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1895, by the collector of Valencia County on the tax rolls for the year 1896; and the Supreme Court of New Mexico erred in refusing to sustain such demurrer to that portion of said intervening petition.

XIII.

The District Court of New Mexico erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550), for the year 1896, by the collector of Valencia County on the tax rolls for the year 1896; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

XIV.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550), for the year 1896, by the collector

of Valencia County on the tax rolls for the year 1896; and the Supreme Court of New Mexico erred in overruling the demurrer to that portion of said intervening petition.

XV.

That the District Court of New Mexico erred in overruling the said demurrer, and each and every part thereof, to the extent the same was overruled; and also erred in the ruling upon each proposition contained in the said demurrer which was by the court overruled.

XVI.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the said demurrer and each and every part thereof to the extent that the same was overruled; and erred in refusing to sustain said demurrer and each and every part thereof to the intervening petition.

XVII.

That the District Court of New Mexico erred in holding the plea in bar filed by said parties in said cause insufficient and in overruling the same.

XVIII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court in holding the plea in bar filed by the appellees in said cause

insufficient, and in overruling the same; and the Supreme Court erred in holding said plea in bar to the intervening petition to be insufficient and in overruling the same.

XIX.

That the District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company through each of the two Spanish grants known as the Joaquin Sedillo and Antonio Gutierrez, or either of them, was not right of way through public lands at the time it was acquired, and in holding that such right of way was not exempt from taxation.

XX.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that the right of way of the Atlantic and Pacific Railroad Company where it crossed the two Spanish grants known as the Joaquin Sedillo and Antonio Gutierrez, or either of them, was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands at the time it was acquired, and in not holding that such right of way was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company where it crossed the two Spanish grants known as the Joaquin Sedillo and Antonio Gutierrez, or either of them, was not exempt from taxation under the facts disclosed by the agreed statement of facts.

XXI.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the San Clemente grant, or right of way acquired by the Atlantic and Pacific Railroad Company, over what was as to it public lands, and that it was not exempt from taxation.

XXII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that the right of way of the Atlantic and Pacific Railroad Company, as it crosses the San Clemente grant, was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and holding that it was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the San Clemente grant was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and that it was not exempt from taxation.

XXIII.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Nicholas Duran de Chaves was not right of way acquired over public lands and was not exempt from taxation.

XXIV.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Nicholas Duran de Chaves was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and holding that it was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Nicholas Duran de Chaves was not the right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and that it was not exempt from taxation.

XXV.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Antonio Sedillo, was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and was not exempt from taxation.

XXVI.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Antonio Sedillo was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and holding that it

was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Antonio Sedillo was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and that it was not exempt from taxation.

XXVII.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Laguna Indian pueblo tracts was not right of way acquired over public lands and was not exempt from taxation.

XXVIII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Laguna Indian pueblo tracts was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands and holding that it was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Laguna Indian pueblo tracts was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and that it was not exempt from taxation.

XXIX.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Laguna was not right of way acquired over public lands and was not exempt from taxation.

XXX.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Laguna was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands and holding that it was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Laguna was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands and that it was not exempt from taxation.

XXXI.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Acoma was not right of way acquired over public lands and was not exempt from taxation.

XXXII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Acoma was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and holding that it was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Acoma was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and that it was not exempt from taxation.

XXXIII.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any authority to make any additional assessments upon the tax rolls of 1896 of any property of the Atlantic and Pacific Railroad Company, for any preceding year or years.

XXXIV.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any authority to make any additional assessments upon the tax rolls of 1896, of any property of the Atlantic and Pacific Railroad Company, for any preceding year or years; and the said Supreme Court erred in holding that Solomon

Luna, as collector of Valencia County, on June 7, 1897, had any authority to make any additional assessments upon the tax rolls of 1896, of any property of the Atlantic and Pacific Railroad Company, for any preceding year or years.

XXXV.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1892, and to extend any levy of taxes against any such assessment.

XXXVI.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1892, and to extend any levy of taxes against any such assessment; and the said Supreme Court erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1892, and to extend any levy of taxes against any such assessment.

XXXVII.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1893, and to extend any levy of taxes against any such assessment.

XXXVIII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1893, and to extend any levy of taxes against any such assessment; and the said Supreme Court erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1893, and to extend any levy of taxes against any such assessment.

XXXIX.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1894, and to extend any levy of taxes against any such assessment.

XL.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1894, and to extend any levy of taxes against any such assessment; and the said Supreme Court erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1894, and to extend any levy of taxes against any such assessment.

XLI.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1895, and to extend any levy of taxes against any such assessment.

XLII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1895, and to extend any levy of

taxes against any such assessment; and the said Supreme Court erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1895, and to extend any levy of taxes against any such assessment.

XLIII.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1896, and to extend any levy of taxes against any such assessment.

XLIV.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1896, and to extend any levy of taxes against any such assessment; and the said Supreme Court erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1896, and to extend any levy of taxes against any such assessment.

XLV.

The District Court of New Mexico erred in holding that any interest should be charged prior to December, 1897, upon any taxes found to be due for any year.

XLVI.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that any interest should be charged prior to December, 1897, upon any taxes found to be due for any year; and the said Supreme Court erred in holding that any interest should be charged prior to December, 1897, upon any taxes found to be due for any year.

XLVII.

The District Court of New Mexico erred in holding that F. W. Clancy had sufficient authority to authorize him to file the intervening petition in the name of, and for, and on behalf of, the Territory of New Mexico.

XLVIII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that F. W. Clancy had sufficient authority to authorize him to file the intervening petition in the name of, and for, and on behalf of the Territory of New Mexico; and the said Supreme Court erred in holding that F. W. Clancy had sufficient authority to authorize him to file the intervening petition in the name of, and for, and on behalf of, the Territory of New Mexico.

XLIX.

The District Court of New Mexico erred in holding and determining the issues joined by the answer to the intervening petition of the territory against the said C. W. Smith and the United States Trust Company.

L.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in holding and determining the issues joined by the answer to the intervening petition of the territory against the said C. W. Smith and the United States Trust Company; and the said Supreme Court erred in holding and determining the issues joined by the answer to the intervening petition of the territory against the said C. W. Smith and the United States Trust Company.

LI.

The District Court of New Mexico erred in determining upon the agreed statement of facts that fifty-five and one-half (55½) miles of improvements of the right of way of the railroad formerly the property of the Atlantic and Pacific Railroad Company was assessable, and that the taxes levied upon such improvements upon the assessments made by the collector should be paid.

LII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining upon the

agreed statement of facts that fifty-five and one-half (55½) miles of improvements on the right of way of the railroad formerly the property of the Atlantic and Pacific Railroad Company was assessable, and that the taxes levied upon such improvements upon the assessments made by the collector should be paid; and the said Supreme Court erred in determining upon the agreed statement of facts that fifty-five and one-half (55½) miles of improvement on the right of way of the railroad formerly the property of the Atlantic and Pacific Railroad Company was assessable, and that the taxes levied upon such improvements upon the assessments made by the collector should be paid.

LIII.

The District Court of New Mexico erred in determining that the taxes ascertained to be due upon the improvements on the right of way should bear interest from any date prior to the first day of January, 1898.

LIV.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that the taxes ascertained to be due upon the improvements on the right of way should bear interest from any date prior to the first day of January, 1898; and the said Supreme Court erred in determining that the taxes ascertained to be due upon the improvements upon the right of way should bear interest from any date prior to the first day of January, 1898.

LV.

The District Court of New Mexico erred in determining that the amount due as taxes and interest upon the property in controversy on the 5th day of October, 1899, was the sum of seventy-four thousand one hundred and sixty-eight dollars and seventy cents ($74,168.70).

LVI.

The said Supreme Court of New Mexico erred in determining that the amount due as taxes and interest upon the property in controversy on the 5th day of October, 1899, was the sum of sixty-one thousand nine hundred and twenty-two dollars and seventy-three cents ($61,922.73), which it determined should draw interest from that date.

LVII.

The District Court of New Mexico erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1892.

LVIII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1892; and the said Supreme Court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1892.

LIX.

The District Court of New Mexico erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1893.

LX.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1893; and the said Supreme Court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1893.

LXI.

The District Court of New Mexico erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1894.

LXII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1894; and the said Supreme Court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1894.

LXIII.

The District Court of New Mexico erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1895.

LXIV.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1895; and the said Supreme Court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1895.

LXV.

The District Court of New Mexico erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1896.

LXVI.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1896; and the said Supreme Court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1896.

LXVII.

The Supreme Court of New Mexico erred in finding that the collector of taxes for Valencia County "made the additional assessment set up and referred to in the intervening petition of property which had not been theretofore assessed and placed upon the assessment rolls in any way, so that it could be identified, or the validity of the assessment determined," in that such finding was and is contrary to all the evidence, and contrary to the findings of fact made by the Supreme Court, and contrary to the agreed statement of facts adopted by the Supreme Court.

POINTS, ARGUMENT AND AUTHORITIES.

FIRST POINT.

The District Court erred in overruling the amended motion to dismiss the intervening petition of the Territory of New Mexico, and the Supreme Court of the territory erred in affirming such ruling.

This cause was reinstated upon the docket of the District Court upon the mandate of the Supreme Court of New Mexico, on August 4, 1899. (Tr., p. 105.) On the 27th of September following, C. W. Smith, as former receiver, and the United States Trust Company, filed a joint and several amended motion to dismiss the intervening petition, upon the several grounds therein stated, as follows:

"1st. That the receiver, C. W. Smith, was, on or about the 26th day of April, 1898, discharged as receiver in said cause, and from that time to this the said receiver has had no funds or property in his hands where with to answer any judgment that might be rendered against him as such receiver.

2nd. That it appears from the files in the above entitled cause that at the time of the filing of the intervening petition herein all of the property in the hands of the receiver and in the custody of the court had been sold and conveyed to third parties under the decree of this court, who were not, and have not been made, parties hereto.

3rd. That the claims and demands set forth and stated in the intervening petition filed herein were never presented to the parties who purchased the property sold under the decree of foreclosure in this cause, or their assigns, and that no notice was ever given to such purchasers or their assigns that any such claims or demands would be filed by the Territory of New Mexico in this cause, prior to the filing of the intervening petition herein, and neither

said purchasers nor their assigns ever refused any payment thereof upon any demand or otherwise.

4th. That the United States Trust Company at the time of the filing of the said interplea had not and never since has had any interest in the subject-matter of this intervening petition, as fully appears from the records and files in this cause.

5th. That the name of the Territory of New Mexico as used in the intervening petition is without any right, leave or authority on the part of the party using the same.

6th. That no suit or intervening petition was ever authorized by any person or persons authorized to use the name of the Territory of New Mexico." (Tr., p. 107.)

Facts Upon Which This Motion Was Based.

This motion was based upon the record in the cause in which the intervening petition was filed, and upon the facts shown by two affidavits of Mr. Sterry (Tr., pp. 108–115), and two affidavits made by Mr. Clancy (Tr., pp. 117–196). The motion was heard by the court, and on the 27th of September, 1899, was overruled. (Tr., fol. 221, p. 126.)

The facts appearing upon the record in the cause in which the intervening petition was filed, and from the affidavits which were before the court, were in substance as follows:

On April 10, 1896, the final decree of foreclosure was entered. (Tr., fols. 55–82, pp. 29–44.) The final decree provided, among other things, that upon the sale of the property, the purchaser or purchasers should, as a part of the consideration and purchase price of the property, in addition to the amount bid—

"pay, satisfy and discharge * * * any indebtedness and obligations or liabilities * * * legally contracted or incurred by the receiver before delivery of possession

of the property sold, * * * also any indebtedness and liabilities contracted or incurred by said delendant railroad company in the operation of its railroad prior to the appointment of receivers, which are prior in lien to said first mortgage, and which shall not be paid or satisfied out of the income of the property in the hands of the receiver, upon the court adjudging the same to be prior in lien to said mortgage and directing payment thereof."

It was further provided in this decree that—(the italics are ours)

"in the event that said purchaser or purchasers *shall refuse, after demand made,* to pay any such indebtedness, obligations or liabilities, *the person holding the claim therefor may, upon fifteen days' notice to said purchaser or purchasers, their successor or successors, assign or assigns, file his petition in this court to have such claims enforced against the property aforesaid, in accordance with the usual practice in relation to claims of a similar character;* and such purchaser or purchasers, and his or their successor or successors, assign or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, and either party shall have the right to appeal from any judgment, decree or order made thereon. And jurisdiction of this cause is retained by this court for the purpose of enforcing the foregoing provisions of this decree; and the court reserves the right to retake and resell said property in case the purchaser or purchasers, his or their successors or assigns, shall fail to comply with any order of the court in respect to the payment of such prior indebtedness, obligation or libilities within thirty days after service of a copy of such order." (Tr., pp. 39, 40.)

The final decree of foreclosure was executed on May 4, 1897, by a sale of the property decreed to be sold, to Victor Morawetz, Aldace F. Walker and R. Somers Hays. (Tr., pp. 110–118.) On May 4, 1897, a decree of confirmation was entered in said cause. (Tr., pp. 43–51.) The decree of confirmation contained the same provisions concerning the payments by the purchasers to be made in

addition to the price bid, as part of the purchase price and consideration for the property sold, as were contained in the decree of foreclosure, and in addition thereto it contained the further provision that "any taxes which may finally be adjudged to be a lien upon the property sold under the decree as aforesaid" should also be paid by the purchasers (Tr., p. 47), the main provisions in the decree of confirmation concerning this matter being in the following language:

"It is further ordered, adjudged and decreed that, upon the execution of the deed to be executed and delivered by the special master, as herein ordered, and upon request of the grantees in such deed, the receiver is authorized, directed and required to let the said grantees, their successors and assigns, into possession of the premises conveyed, and the receiver, or any party to this cause, having possession thereof, shall deliver any of the premises sold, which may be in their possession, to such grantees, their successors or assigns, together with any property and income acquired or received by the receiver in the management or operation of the mortgaged premises; subject, nevertheless, to the condition that the court may retake and resell the property in case the purchasers, their successors or assigns, shall fail to pay any balance of the purchase price unpaid or to comply with any order of court with respect to the payment of the prior indebtedness, obligations and liabilities, as provided in said decree of foreclosure and sale, within thirty days after the service of a copy of such order. * * * Jurisdiction of this cause is retained by this court for the purpose of enforcing the provisions of this decree and the terms and conditions of the conveyance of said property and premises; and full power is reserved to the court, notwithstanding such conveyance and delivery of possession, to retake and resell the said property and premises conveyed, if said purchasers, their successors or assigns, shall fail or neglect fully to complete such purchase and comply with all the terms, conditions and provisions of said decree of foreclosure and sale and of this decree, and shall fail to comply with any

order of the court in respect to the payment of such prior indebtedness, obligations or liabilities." (Tr., pp. 49, 50.)

On June 2, 1897, the special master executed to the purchasers a deed of conveyance of the property sold (Tr., pp. 110–119), the form of which had been submitted to the court and approved in the decree of confirmation. (Tr., p. 49.)

On July 1, 1897, upon demand of the purchasers, in accordance with the decree, the receiver surrendered possession of all the property against which the taxes were claimed to have been levied to the Santa Fe Pacific Railroad Company, as assignee of the purchasers, and since the first day of July, 1897, neither the court, or its receiver, has had possession or control of such property, or any part of it, or of any funds or property pertaining to, or belonging to, the Atlantic and Pacific Railroad Company. (Tr., 115.)

While the appeal in this case was pending in this court, and on October 4, 1898, Mr. Smith, having finally accounted, was discharged as receiver, and no successor was ever appointed. (Tr., pp. 104, 325.)

Prior to the entry of the decree of foreclosure, and on March 12, 1896, the Territory of New Mexico had intervened in this cause to recover taxes claimed to have been levied upon an assessment of the right of way of the Atlantic and Pacific Railroad Company, in Bernalillo County, New Mexico, for the years 1893, 1894 and 1895. On June 5, 1896, the District Court held (upon such intervening petition and the issues joined thereon by the receiver and the plaintiff in the bill of complaint) that the territory had a right to recover the taxes sued for. Upon an appeal by the receiver and the complainant in the bill, the United States Trust Company, the Supreme Court of New Mexico,

on the 18th day of December, 1896, reversed the judgment of the District Court, and held that the right of way of the Atlantic and Pacific Railroad Company in Bernalillo County was exempt from taxation. This decision was subsequently affirmed by this court. (172 U. S., 171.)

At the time of the sale and of the confirmation there appeared upon the assessment and tax rolls of Valencia County, New Mexico, for the years 1892 to 1896, inclusive, an assessment of the right of way of the Atlantic and Pacific Railroad Company (being a portion of the property sold) and the taxes which were levied and extended against such assessment. (See Tr., pp. 178, 186, 193, 199, 205.)

At the time of the confirmation of the sale, Mr. Clancy, having been employed by the Counties of Bernalillo and Valencia (under an act of the legislature of the Territory of New Mexico) to collect taxes claimed by each county, appeared before the court for his clients, and, after some controversy, procured the insertion in the decree of confirmation of the clause which required the purchasers to pay, in addition to the price bid and as part of the purchase price, any taxes which should finally be adjudged to be a lien upon the property sold. (See Clancy's affidavit, Tr., pp. 125–127.)

At the time of the confirmation of the sale, the only action of any kind pending for the recovery of any taxes levied upon the assessment of any portion of the right of way of the Atlantic and Pacific Railroad Company in New Mexico was the appeal pending from the decision of the Supreme Court of New Mexico, referred to, which was pending in this court, and which did not include the appeal in this controversy (subsequently taken) heard by this court at the

same time with the other appeal. No action or proceeding of any kind had been commenced to enforce any claim for any taxes in Valencia County, except certain proceedings instituted in the Mercantile Trust Company case by the collector of the county to recover taxes for 1892 and 1893, in 1894. (Tr., pp. 63–71.)

The claims contained in the intervening petition under consideration were never presented to the purchasers; no demand was ever made upon the purchasers for payment of such claims, or either of them; no notice was ever given to the purchasers of the intention on the part of the territory, or anyone else, to file this intervening ptition, as required by the final decree and the decree of confirmation. (Tr., p. 116.)

The intervening petition was filed without notice on June 10, 1897 (Tr., p. 34), as stated, more than a month after the sale of the property had been made and confirmed and eight days after the property had been actually conveyed to the purchasers by the special master. (Tr., p. 110.) The assessment of the property on which the taxes were levied was never made until more than a month after the sale of the property to the purchasers, so that the taxes were never levied, and never became liens upon this property, until June 7, 1897. (See Clancy's affidavit, Tr., p. 119.)

The undisputed facts above recited necessarily abated the proceedings instituted by the territory in the filing of the petition in intervention, and the court, upon the reinstatement of such proceedings, under the mandate of the Supreme Court, should either of its own motion have dismissed said proceedings or should have sustained said motion.

I.

It is apparent, from any reading of the intervening petition in controversy, that the territory, in filing such intervening petition, was attempting to ignore the terms of the decree of foreclosure and the decree of confirmation, and to procure, by order of the court, from the receiver, out of the funds in his possession, the payment of the taxes claimed, in order to avoid any controversy with the purchasers. This petition in intervention alleges in its first clause that certain property of the Atlantic and Pacific Railroad Company was omitted in the assessment of taxable property in Valencia County for the years 1892 to 1896, inclusive, and that the collector of that county placed the same, as omitted property, upon the tax rolls in his hands for the year 1896; then follow allegations as to the action of the collector concerning the assessment of the property on the rolls for 1896 for each omitted year; then comes the 7th clause, followed by the prayer of the petition, reading as follows:

"7. The receiver of the property of the said railroad company, heretofore appointed in this cause, refuses to pay the said taxes, or any part thereof, and disputes the validity of the same, upon the ground that all of the property so listed, valued and assessed as aforesaid is exempt from taxation by virtue of the provisions contained in the second section of an act of Congress, entitled 'An Act granting

lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,' which became a law on the 27th day of July, 1866; but your petitioner charges that the said exemption from taxation extends only to the right of way granted to said railroad company on each side of its railroad, where it may pass through the public domain, and does not extend to any improvements made upon the said right of way, nor to the said right of way itself where it passes through land not included in the public domain.

Your petitioner therefore prays that the said taxes so levied as aforesaid may be declared by decree of this court to be a lien upon said property of said railroad company, now in the hands of the said receiver, and that the said receiver may be ordered and directed to pay the said taxes, together with the interest thereon, to the collector of taxes in and for said County of Valencia, and that your petitioner may have such other and further relief as equity may require and to your Honor shall seem meet." (Tr., pp. 50–53.)

While the court, in authorizing the filing of this petition, ordered that the parties to the cause should appear and show cause why the prayer of the petition should not be granted, it only ordered copies of the petition and order to be served upon the solicitor of the Mercantile Trust Company, the solicitor of the complainant and the solicitor of the receiver. (Tr., p. 57.) No notice of any kind was either ordered to be given, or was, as a matter of fact, given to the purchasers of the property to whom it had been conveyed eight days prior thereto.

That this petition did not attempt to assert any right under the decree fully appears from the fact that it made no reference whatever to the provisions, or terms, of the decree, and asked no relief under the same. It is well settled that while a petition in intervention need not be formal, but may be brief, yet it should exhibit all the material facts which are relied upon for the specific relief in-

voked, embodying either by a recital or by reference so much of the record in the original suit in which the petition is filed as is essential to show a right to the particular relief demanded by the petition.

Empire Distilling Co. v. *McNulta*, 77 Fed., 703.

Beach's Modern Eq. Pr., Par. 579, and authorities cited.

The statute upon which the right to sue was based required a description of the property to be inserted in such pleading (Sec. 4157 Appendix).

It was evidently treated by the court and all parties to it simply as a proceeding against the receivership and the funds in the hands of the receiver. It could be treated as nothing else, since the intervention was not made under the terms and conditions of the decree, and the petition therefor was utterly silent as to any demands against the purchasers.

Assuming that it was possible for the court to entertain jurisdiction of the application contained in this intervening petition seeking to require the receiver to pay these taxes out of the funds in his hands, such jurisdiction absolutely ended when the court, prior to October, 1898, finally disposed of all the funds in the hands of the receiver, and, on October 4, 1898, discharged him, without the appointment of any successor. When this case was reinstated upon the docket of the District Court (upon the mandate of the Supreme Court of the territory), the District Court, having parted with the possession of the property upon which the taxes were claimed to have been levied; having disposed of all the funds that it ever had possession of in the foreclosure suit, and having finally discharged its receiver

should, of its own motion, have dismissed the intervening petition.

In support of this proposition we quote at length from a decision of the Supreme Court of Mississippi in the case of *Bond* v. *State* (68 Miss., 648), as follows:

"The third plea of the defendant below averred a perfect bar to the further prosecution of the suit against him officially, as receiver, and the demurrer thereto should have been overruled. The appellant had been appointed receiver of the Vicksburg and Meridian Railroad by the Circuit Court of the United States for the Southern District of Mississippi, and was sued as such receiver in this action. After suit instituted, and before plaintiff below filed its amended declaration, the appellant was, by an order of the court appointing him, fully and finally discharged from the receivership, and this discharge from his official trust he sought to avail himself of by his third plea. Manifestly, the suit was instituted to charge the appellant in his official character, and to subject to liability the property of the railroad company held by him by virtue of his representative character. The action is not against the individual, and the purpose was to reach the property of the railroad company in his hands as the representative of the company. The final discharge of the receiver put an end to his official existence, and withdrew from his care and management the road and property of the company. The discharge having terminated the representative character of the receiver, we are at a loss to understand how any judgment could be rendered against him officially that would render liable to its satisfaction any property of the company—property in his hands when suit was brought, but now finally withdrawn from him by the extinction of his official character before his plea was filed. There is no demand against him as an individual, but only as the representative of the railroad company. It seems plain to us that, with the termination of his representative character and the withdrawal of the road and its property from his custody by the order discharging him, no judgment could be rendered against him properly, as the representative of the company, whereby to make its property

chargeable. His official liability ended with his official existence. The third plea disclosed a perfect defense for the receiver. See *Telegraph Co.* v. *Jewett*, 115 N. Y., 166, 21 N. E., 1036; *Woodruff* v. *Jewett*, 115 N. Y., 267, 22 N. E., 156; *Farmers' Loan and Trust Company* v. *Central R. Co*, 2 McCrary, 181, 7 Fed., 537; *Brown* v. *Gay*, 76 Tex., 444, 13 S. W., 472; Beach Rec., Par. 715, 720."

We also quote at length from a decision of the Supreme Court of Texas in the case of *Brown* v. *Gay* (76 Tex., 444):

"The answer showed that the receiver had been discharged, and all the property theretofore in his hands delivered to the railway company, in pursuance of the order of the court that appointed him; and the order directing this to be done declared that it should remain liable in the hands of the company, for such claims as were proper against the receivership. The ruling of the court was that this action might be sustained against the person who was receiver at the time the injury occurred, notwithstanding he had ceased to be the receiver, and to control, or have the right to control, any fund out of which the judgment to be rendered could be paid. The act of March 19, 1889, was not in force when that ruling was made; and its provisions are, therefore, not applicable to this case. The only ground on which it can be held that property belonging to a railway or other corporation, or to an individual, can be subjected to a sale under judgment against a receiver is that he, with reference to the property so controlled by him, and as to the rights growing out of its management, is the representative of the owner. Can it be said that this representative character continues after the court that appointed him has discharged him, and withdrawn from him all control or right to control the property? We think not. Being no longer the representative of the company in any respect, a judgment against him would not bind it or its property. There being no personal liability or fund left in his hands subject to the control of the court that appointed him, a judgment rendered against him as receiver would be fruitless. As said in *Ryan* v. *Hays*, 62 Tex., 47: 'The sole liability of a receiver, except in cases in which he is personally at fault, is official; and when his official character ceases, and the

property through which, alone, his official liability may be discharged, has passed from his hands, in pursuance of the orders of the court that appointed him, and he has been by that court discharged from his trust, then no judgment can be rendered against him; for with the termination of his official existence ends his official liability.' *Railroad Co.* v. *Ormond, id.*, 274; *Davis* v. *Duncan*, 19 Fed. Rep., 477; *Trust Co.* v. *Railroad Co.*, 7 Fed. Rep., 537; *White* v. *Railroad Co.*, 52 Iowa, 97, 2 N. W. Rep., 1016. The plea to which exception was sustained not only stated facts which, if admitted, showed that no judgment could legally be rendered against the receiver, but stated facts which showed that the Texas and Pacific Railway Company should be made the defendant, as did it state facts which, with some additional facts, would entitle appellees to recover if the injuries resulted from facts that would have authorized a judgment against the receiver had he not been discharged. The plea was a suggestion to the court that the action could not longer be continued against the receiver; and, while the facts stated were not such as to abate the action, they were such that the court should have declined to proceed with the case until the company was made a defendant. This, in analogy to other cases in which a defect of parties arises after action brought, is believed to be the correct practice in cases in which a receiver dies or is removed after action brought against him, or by him, or in case a receiver defendant is discharged, and the property in his hands, subject to payment of a judgment to be rendered, is returned by order of court to its owner. *Wilson* v. *Wilson*, 1 Barb. Ch., 592; *Palmer* v. *Murray*, 18 How. Pr., 549; *Searcy* v. *Stubbs*, 12 Ga., 438; *Lehigh Coal and Nav. Co.* v. *Central Ry. Co.*, 42 N. J. Eq., 591, 8 Atl. Rep., 648; *Talmage* v. *Pell*, 9 Paige, 413; *Sheldon* v. *Adams*, 27 How. Pr., 180; Rev. St., arts. 1246–1255. As the case is now presented, the facts alleged in the plea excepted to must be treated as true; and, so treating them, we hold that the court erred in rendering judgment against the receiver. The question which would arise under the receiver's pleadings as to the liability of the company have been considered in other cases. As the proper parties were not before the court to try the merits of the case, we do not now feel that

it is necessary to consider the many assignments of error relating to matters occurring on the trial.

"The receiver was such representative of the company, when the action was brought, as to make it practically, then, an action against the company; and, for this reason, it would not abate when he was discharged, but might be further prosecuted against the company, if substituted for the receiver, who has ceased to represent it."

See, also, upon the same point, *Fordyce* v. *Du Bose* (87 Tex., 78).

A case very much in point (in that the receiver was discharged pending an appeal) is that of the *Texas and Pacific Ry. Co.* v. *Watson et al.*, decided by the Court of Civil Appeals of Texas, and reported in 24 S. W., 952.

We quote at length from the decision of the Court of Appeals of New York in the case of *N. Y. & W. U. Tel. Co. in re.* v. *Jewett* (115 N. Y., 166), as follows:

"In the actions commenced against the Erie Railroad Company, the court had taken into its possession the property of the company, to dispose of, manage and administer it for the benefit of all parties interested therein or having any claims against the same; and the receiver was merely its officer, arm or agent to take possession of the property, and manage and dispose of the same under its direction, and subject to its control. He could at any time be discharged by the court and another receiver appointed; or the property could be taken out of his hands and restored to its owner, or otherwise disposed of under the judgment in the actions in which he was appointed. No creditors having a claim against the railroad company or its property could sue the receiver, or obtain payment out of the property, except by the consent of the court. A creditor desiring payment out of the property in such a case is obliged to apply to the court; and, for the purpose of having the claim adjudicated, it may authorize a suit against the receiver, or it may hear the claim upon a summary application upon affidavits or oral evidence; or, where the claim is disputed, it may order a reference; and, whether

the proceeding be aganist the receiver by action or by a summary application, the purpose is to enable the court to determine whether the claim ought to be paid. Obviously, after the receiver has been discharged, and the property by the action of the court has all been taken out of his hands, there can be no propriety whatever in any further proceedings against him, because thereafter he ceases to represent anyone. He can no longer act for or represent the company or its creditors, or any other person interested in the property; and, manifestly, the court could not thereafter make an order that he should pay a creditor, he no longer having any funds out of which payment could be made. *Trust Co.* v. *Railroad Company*, 2 McCrary, 181; 7 Fed. Rep., 537. It would be a very singular proceeding to permit a creditor to litigate his claim with a person who was formerly a receiver, but who has ceased to be such, and who is not longer the officer or agent of the court, or subject to its control."

See, also:

McNulta v. *Lockridge*, 137 Ill., 281, 282.

Farmers' Loan & Trust Co. v. *Central R. of Iowa*, 7 Fed., 539.

High on Receivers (2nd Ed.), Sec. 398b, and authorities cited.

II.

When the court approved the final account of the receiver and discharged him, there being no fund in the custody of the court to be distributed, it necessarily lost jurisdiction of this intervening petition, since it was beyond its power to satisfy the same out of funds previously disposed of. The only parties served by the intervening petition were no longer affected by it. The funds sought to be reached and appropriated were no longer under the control of the court.

Ordinarily an intervening petition cannot be filed after final judgment or decree, since the court then loses jurisdiction, except to enforce such judgment or decree.

Meadow et al. v. *Goff*, 90 Ky., 540.

11 Encyc. Pl. & Pr., p. 503 and note 5.

Therefore the only jurisdiction which the court retained after confirmation of the sale was to distribute the funds derived therefrom, and such further jurisdiction as it specifically reserved over the purchaser and property sold under and by virtue of the terms of the final decree. As the petition did not seek to enforce the terms of the decree against the purchasers, since no reference was made to the same, and no notice given to the purchasers, as required thereby, it could therefore only be treated as an intervention to reach funds in the hands of the receiver still remaining undisposed of. It was the duty of the intervenor to see that the court did not lose jurisdiction over such funds, for if it did it necessarily would lose jurisdiction to grant relief on the intervening petition.

The District Court acquired no jurisdiction to entertain this petition in intervention for the purpose of enforcing its claims against either the purchasers or the property purchased by reason of the failure of the Territory to first present the claims contained in it to the purchasers for payment, and its failure to give fifteen days' notice to the purchasers of an intention to file such intervening petition in the foreclosure suit, as required by the terms of the decree.

I.

Any unpaid valid taxes levied against an assessment of the property in controversy in the County of Valencia, either before or during the receivership, were, by force of the statute (see section 2849 of the Stats. of New Mexico in the Appendix), a lien upon such property which were not and could not have been divested by the court in the foreclosure case, neither the county nor the territory being parties to such suit. While it is true that during the possession of the property by the receiver, under the orders of the court, the lien of such taxes could not have been enforced against the property itself (*Ex parte Tyler*, 149 U. S., 164), yet, after the sale of the property under the decree, the confirmation of the sale, its conveyance and surrender of its possession to the purchasers, the Territory or the county could have pursued any remedy given by the statutes for the enforcement of such taxes against the property or its owners. So long as the County of Valencia or the Territory of New Mexico had not seen fit to attempt to enforce any claim for taxes (except as the collector acted in the Mercantile Trust Company case), during the time the property was in the custody of the court preceding its sale

and conveyance, their right to enforce any such claims after such sale and conveyance in the foreclosure action was necessarily limited to the mode and manner pointed out by the decree of foreclosure for the enforcement of liabilities against the purchasers which were to be paid by them as a part of the purchase price.

The decree of foreclosure required that the purchasers of the property, at any sale under it, should, in addition to the amount bid, pay as part of the consideration and purchase price all liabilities incurred by the Atlantic and Pacific Railroad Company prior to the receivership which were liens upon the property superior to the lien of the mortgage, and also all liabilities incurred by the receiver. This required, undoubtedly, the payment of such taxes as were valid claims against the property.

San Francisco v. *Jones*, 20 Fed., 188.
San Francisco v. *Luning*, 73 Cal., 610 (15 Pac., 311).
State v. *Mining Co.*, 14 Nev., 226.
State v. *Certain Lands in Redwood County* (S. C. Minn.), 42 N. W., 478.

This requirement in the decree of foreclosure not satisfying the territory, it appeared, through its solicitor, Mr. Clancy, before the court at the time of the confirmation of the sale and procured to be inserted in such decree the specific requirement that the purchasers should pay as part of the purchase price all taxes that might be determined to be a valid lien upon the property. (Tr., pp. 47, 125).

If there had been no requirement in the decrees of the court that the purchasers should pay any valid taxes, the purchasers would have taken the property subject to the lien of any such taxes, but without any personal res-

ponsibility for their payment. Notwithstanding its right, and the right of Valencia County to enforce any valid taxes which were a lien upon the property after its sale and delivery to the purchasers, in any way consistent with the statutes of New Mexico, the territory came into the foreclosure case and asked the court to create for it a right to hold the purchasers *personally* responsible for such taxes, with the right to enforce the collection of them in the action in which the property was sold, in a manner and by a proceeding unknown to the procedure in New Mexico for the collection of taxes. Acquiring the right to collect any valid taxes in a manner different from that known to the statutes of New Mexico, through the reserved jurisdiction of the court in the foreclosure case, the territory was necessarily limited to the proceedure provided by the terms of the decree, when it sought to obtain the benefits of it,

II.

That the purchase of the property upon its sale under the decree of foreclosure, the confirmation of such purchase, and the conveyance of the property to the purchasers, created a contract between the purchasers and the court as to the method and manner in which the unknown liabilities assumed by the purchasers as part of the purchase price were to be enforced, and that the court was powerless to change the terms of such contract without the consent of the purchasers, is, as it seems to us, indisputable.

Kneeland v. *American Loan Co.*, 136 U. S., 89.

Davis v. *Mercantile Trust Co.*, 152 U. S., 594.

As was said by Justice Brewer in delivering the opinion of the court in the case of *Central Trust Co. et al.* v. *Wabash, St. L. & P. R. R. Co. et al.* (30 Fed., 332):

"It is as old as judicial sales, iterated and reiterated with unvarying and emphatic voice, that a purchaser at a judicial sale looks to the judgment or decree for the measure of his rights. He does not look back of the decree to questiions which might have been presented, or might have been differently determined between the litigating parties; he looks to the decree, and upon that alone he rests. That measures his rights. It is his muniment of title, and when he purchases and pays he has a right to say that that is his contract with the court, and no court ever did and no court ever ought to change the contract which it has made, when by its decree solemnly entered it invites persons to buy and upon the faith of that invitation persons do buy and pay."

We quote from the opinion of the court in the case of *Fidelity Ins. T. & S. Co.* v. *Norfolk & W. R. R. Co.* (88 Fed., 820. The italics are ours):

"The claim sought to be established in the state court against the railway company is a liability accruing during the time the receivers were in control and possession of the railroad, *and must be established in the manner prescribed by the decree.* The court did not surrender its jurisdiction over this class of claims, nor did its jurisdiction end with the execution and delivery of the deed of conveyance. It specifically provided in the decree of sale what liabilities the purchaser of the railroad property should assume as part of the purchase price therefor, and how such liabilities should be ascertained. These provisions of the decree entered into and became a part of the contract of purchase. The railway company by its purchase became a party to this suit. It is bound by the terms of the decree of sale, and it has a right to have them enforced in its behalf."

We quote from the opinion of the court in the case of *C. & O. R. R. Co.* v. *McCammon* (C. C. A., 7th Cir.; 61 Fed., 774), as follows:

"The rights and liabilities of a purchaser at a judicial sale are measured by the terms and conditions of the decree. * * * The sale, when confirmed by the court and its conditions met by the purchaser, created, in effect, a contract between the court and the purchaser, and the court could no more impose an additional term or condition upon that contract than could an individual. *Farmers' Loan & Trust Co.* v. *Central R. of Iowa*, 7 Fed., 537; *Davis* v. *Duncan*, 19 Fed., 477."

We quote from the Supreme Court of Texas, in its decision in the case of *Houston & T. C. R. Co.* v. *Crawford* (88 Fed., 277), as follows:

"As a general rule, the purchaser of a railroad at a sale made under an order of a court holding the custody of the property, by a receiver, takes the property free from claims against the receiver arising out of the operation of the road; but the court ordering the sale may impose upon the purchaser liability for such debts, as a part of the consideration of his purchase. *Hicks* v. *Railroad Co.*, 62 Tex., 41; Beach Rec., Par. 735. *A purchaser under such order can only be held liable according to its terms.* In this case the order directing that possession be delivered to the purchaser prescribed that he should take the property subject to the payment of such claims against the receiver as might be established before that court within a given time. This was a condition of liability, and the purchaser cannot be held by virtue of the order alone, except for the claims so ascertained and allowed."

See, also,

C. T. Co. v. *St. L., A. & T. R. R. Co.*, 59 Fed., 385.

Farmers' Loan & Trust Co. v. *Central R. Co. of Iowa*, 7 Fed., 540. (This last case may be considered a leading case on the sobject.)

III.

It must be true that the court lost jurisdiction to proceed any further in such case, except in respect to those matters concerning which it specifically, by the terms of the decree, retained jurisdiction to proceed in the case. Therefore, the court could grant no right to file an intervening petition in the case at the time when this intervening petition was filed, except that the terms and conditions concerning the right reserved in the decree to file such petition were strictly complied with. Neither the County of Valencia nor the Territory of New Mexico were bound by the terms of the decree, except as they attempted to acquire rights through it. Notwithstanding the requirement in the decree of confirmation that the purchasers should pay valid taxes, the county and the territory could have ignored such provision and have proceeded in the courts of the territory to enforce the collection of the taxes against the property in any way authorized by the laws of the territory.

IV.

The learned court below, in answer to the proposition that a demand must first have been made upon the purchasers for the payment of these claims, and then, upon their refusal to pay, a notice of fifteen days given them of the intention to file an intervening petition, say, in substance, that Mr. Sterry, who had been resisting these claims since the first attempt had been made to collect them in the Mercantile Trust Company case, "was employed by the purchasers to attend to any pending or future litigation against the receiver." That service of the inter-

vening petition was made at his office on June 10, 1897, and a letter on the subject mailed to him at Los Angeles, California, on the same day; that on June 23, 1897, he filed pleas to the intervening petition, and that ever since July 1, 1897, he has been in charge of all the legal business of that company in New Mexico. The court then further say:

"We cannot agree to the proposition of the appellants that the parties to whom the railroad was sold should have been made parties to this proceeding, and we know of no way by which, under the petition of intervention, the petitioner could have made them parties. This is a proceeding *in rem*, begun when the property was in the hands of the court, and anyone receiving it from the court took it *cum onere*. In addition to this, the court at the time the order confirming the sale was filed retained jurisdiction of the cause, and reserved full power to retake and sell the property if the purchasers, their successors or assigns, should fail to comply with any order of the court in respect to the payment of prior indebtedness, obligations, or liabilities.

No one was injured by the manner in which the notice was given, and it is evident that all of the parties in interest knew of the proceeding, and that such of them as desired contested the same.

The making of the demand on the purchasers for the payment of these taxes would have been a useless formality for both they and their predecessors and successors have always refused to pay them, and have vigorously fought their collection, and are doing so even at the present moment. If the purchasers of the property had desired to settle these taxes they could have paid the money into court.

Furthermore, as late as December 19, 1898, on motion of the Santa Fe Pacific Railroad Company, an order was made by the court allowing creditors of the receivers or of the Atlantic and Pacific Railroad Company to file their claims with the clerk of the Second Judicial District Court on or before October 23, 1899." (Tr., p. 325.)

The learned court, in the position taken, evidently over-

looked the fact that Mr. Sterry was the attorney for the receivers during the entire receivership (Tr., p. 109), and that, under the terms of the decree of confirmation, the purchasers were required to pay, in addition to the purchase price, the compensation of the receivers' attorneys (Tr., p. 48); that after the purchase the purchasers, instead of employing Mr. Sterry (as stated by the learned court), they paid him a lump sum to attend to such further duties as might be required of him as attorney for the receivers (Tr., p. 287); that the notice which was served upon Mr. Sterry was served upon him as solicitor for the receiver, under the order of the court, and not as attorney for the purchasers. Even had he been employed by the purchasers, as stated by the court, such employment would not have made the purchasers parties to the proceedings.

Stryker v. *Crane*, 123 U. S., 527.
Litchfield v. *Goodenough, Ad.*, 123 U. S., 549.
Wilgus v. *Germain* (C. C. App., 9 Ct.), 72 Fed., 773.
Majors v. *Cowell et al.*, 51 Cal., 479.
Black on Judgments, Vol. 2, Sec. 540.
Andrews v. *National Foundry & Pipe Works* (C. C. App., 7 Ct.), 76 Fed., 166.
Central Baptist Church and Society v. *Manchester*, 17 R. I., 492.
Shroeder v. *Lahrman*, 26 Minn., 87.
Canon River Assn. v. *Rogers*, 42 Minn., 123.
Brady v. *Brady*, 71 Ga., 71
Lounsdale v. *Portland*, 1 Or., 381.

It can hardly be claimed that his employment on the 1st of July afterwards, by the Santa Fe Pacific Railroad Company, as assignee of the purchasers, related back so

as to make a service of notice upon him on June 10th previous, as solicitor for the receiver, a service upon the Santa Fe Pacific Railroad Company, which at that time had no legal existence. Neither the purchasers nor their assignee, the Santa Fe Pacific Railroad Company, were ordered to be served with notice by the court at any time. While it is true that the purchasers took the property from the hands of the court "*cum onere*," only took *cum onere* as to the things disclosed in the record, at the time of the sale, and as to things which might arise in the future, concerning which they were to be affected only in the manner provided by the decree. There is nothing in the record warranting the assertion of the learned court that all parties in interest knew of the proceedings, and that such of them as desired contested the same. The property in controversy was conveyed to the Santa Fe Pacific Railroad Company on the 22d of June, 1897, and possession delivered to it on July 1, 1897. (Tr., p. 115.) On the 23d day of June, 1897, the intervening petition was dismissed, and was not reinstated until September, 1899. (Tr., p. 103.) While it is possible that "the making of a demand on the purchasers for the payment of these taxes would have been a useless formality," yet it was a formality required by the terms of the decree, as a condition precedent to an intervention, which would affect the rights of the purchasers. It is very likely true that in an intervention to enforce a claim, which the purchasers were required by the terms of the decree to pay as a part of the purchase price, a petition in intervention would not mention the purchasers as parties, but would be filed in the cause in which the decree was rendered, the purchasers were to be protected by the requirements of the decree that the person intending to file

such a petition, in such cause, should give fifteen days' notice that such a petition would be filed, thereby giving the purchasers such notice as would enable them to appear, when it was filed, and make any defense that they chose to make, under the right granted to them. Upon such notice, the purchasers themselves would have a right to make themselves parties, or not, to the cause and proceedings as they might choose. The learned court was not warranted from the facts before it in saying that the purchasers of the property pleaded to any order that may have been made prior to the filing of this petition, as prior to the purchase the purchasers and their principal were strangers not only to the record but to any duty or obligation to perform any terms.

The theory of the learned court, that this was a proceeding *in rem*, and hence no notice was required to be given, is one that is not tenable, under the facts or the law established by many decisions of this court. At the time of the reinstatement of this case the court will remember that the District Court had surrendered the possession and control of the property to the assignee of the purchasers, at the request of the purchasers, in accordance with the terms of the two decrees; consequently, the court, at the time of the hearing of the motion to dismiss, had not the possession or custody of the property, neither could it acquire the right to render any judgment upon the intervening petition ordering the sale of the property, to satisfy the claims presented by such petition. The right to sell the property to satisfy any claims presented by the intervening petition was a right that could only come into existence after a determination of the amount due, and a service of the copy of the order of the court, directing the payment of such amount, coupled with a failure to comply with its terms for a period of thirty days on the part of the purchasers or their assigns. (Tr., p. 42.) Assuming, however, for the sake of the argu-

ment, that the intervening petition itself presented such a case as would make it a *quasi* proceeding *in rem*, yet the court ~~would be~~ was powerless to act without giving notice of some kind or character to the purcharers, or to the owner of the property sought to be affected.

This proposition is clearly stated by the Circuit Court of Appeals of the Seventh Circuit in its syllabi in the case of *Hook* v. *Mercantile Trust Company of New York et al.* (95 Fed., 41), as follows:

"Where one not originally a party is permitted to file a petition in a suit in equity, and to set up new and different rights from any involved in the original bill, such petition (at least as against a stranger to the suit, who, during its pendency, and before the filing of the petition, has acquired possession of the property in litigation) must be treated as the commencement of a new suit; and such person must be brought in by process in accordance with the established practice, or he will not be concluded by a decree in favor of the petitioner."

In the leading case of *Farmers' Loan & Trust Co.* v. *Central R. R. Co. of Iowa, supra*, the court said, in a case similar to the one at bar (the italics are ours):

"The proceedings by which the claimant asserts his rights in analogous, at least, to an action *in rem*. Now it is familiar law that, in order to give a court full and complete jurisdiction *in rem, some form of notice must be given to parties whose rights and interests may be affected by the decree;* and where no form of notice is prescribed by law, the court is empowered to direct the notice to be given. This notice is sometimes personal and in some cases by publication, depending upon the situation of the parties. In the present case the new railway company—the Iowa Central Railway Company—is the party whose interest would be affected by a decree establishing a lien upon the property. The petitioner *must, therefore, give that company notice, and since it exists within the jurisdiction of the court, the notice must be personal. All this proceeds, of course, upon the condition that the claim has*

been presented to the company for payment and adjustment, according to the express terms of the final decree, and rejected.

These preliminaries having been satisfied, it is competent for the court, if the plaintiff is by law entitled to a lien, to establish the same against the property, and to fix a time for the payment of the sum found to be due; and in default of payment at the time prescribed, a proper order of sale will be awarded."

It is a very familiar rule of law in this court, that no man shall be condemned, in his person or property, without due notice, and an opportunity of being heard in his defense. As was said by Justice Clifford, in delivering the opinion of this court in the case of *Ray* v. *Norseworthy* (23 Wall., 128):

"Notice in some form must be given in all cases, else the judgment, order or decree will not conclude the party whose right of property would otherwise be divested by the proceeding. No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence, without the privilege of showing, if he can, that the pretext for doing it is unfounded."

See, also,

Ray v. *Norseworthy*, 23 Wall., 128.
Windsor v. *McVeigh*, 93 U. S., 274.
Pennoyer v. *Neff*, 95 U. S., 714.
Heidritter v. *The Elizabeth Oilcloth Co.*, 112 U. S., 300.
Freeman et al. v. *Alderson et al.*, 119 U. S., 185.
Hassall v. *Wilcox*, 130 U. S., 493.
Scott v. *McNeal et al.*, 154 U. S., 34.
Holden v. *Hardy*, 169 U. S., 366.
Roller v. *Holly*, 176 U. S., 398.

The following cases are directly in point:

Smith et al. v. *Woolfolk*, 115 U. S., 149, and
Reynalds et al. v. *Stockton*, 140 U. S., 254.

A case very much in point, in which the authorities are reviewed at length, is that of *Hollister* v. *Mann et al.*, decided by the Supreme Court of Nebraska (58 N. W., 1126). On practically the same principle, this court has held that the title to real property, sold at a judicial sale, to a third party, is unaffected by a reversal of the case in which the judicial sale was made.

Gray v. *Brignardello*, 1 Wall., 627.

The taxes sought to be recovered by the intervening *petition were not in* existence at the time of the sale and its confirmation, and never came into existence, or became liens upon such property, until June 7, 1897, more than a month after the sale of the property and its confirmation.

I.

At the time of the hearing of this motion (for the first time) it appeared in the case, from the affidavit of Mr. Clancy, that the assessments of the railroad property, alleged to have been made by the collector as "additional assessments," on the tax rolls for the year 1896, and which were sought to be enforced in this proceeding, were, in fact, made by him on the 7th day of June, 1897, over a month after the sale and its confirmation. (Tr., p. 119.) This admission by the territory to the court at once disclosed to the court that it had no jurisdiction to enforce the collection of such taxes through an intervention in the foreclosure suit. The only statute in New Mexico providing for taxes becoming a lien upon real estate is section 2849. (See Appendix.) This section provides that taxes, when properly levied, are made a lien "from the date of the levy thereof." There was, and is, no statute in New Mexico which provides that when property omitted in previous years is placed upon the assessment roll, and assessed, with the levy of taxes extended against it, such assessment or taxes relate back to any previous time; consequently, when the taxes were levied by the collector, upon the assessment entered by him on the rolls of 1896, for the omitted years, the lien of the taxes dated from the date the assessment was placed upon such rolls, to-wit: June 7, 1897.

As was said by this court in the 5th point of its syllabus, in the case of *Heine* v. *Levee Commissioners* (19 Wall., 655):

"Taxes are not liens unless declared so by the legislature under whose authority they are assessed. *Still less can a lien be created by the mere duty to assess taxes, which has not been performed.*" (The italics are ours.)

This court again, in speaking through Justice Lamar, in the case of *Lyon* v. *Alley* (130 U. S., 177), says:

"The general rule is, that when no time is expressly fixed by the statute for the lien of taxes to take effect, it accrues upon the assessment of the taxes."

Judge Cooley in his work on taxes, page 305, says:

"Taxes are not commonly a lien upon lands unless made so by express legislative authority."

The Supreme Court of South Dakota, in the case of *Miller* v. *Anderson et al.* (47 N. W., 957), states the rule as follows:

"There is no lien on real estate for taxes, except by force of statute and a statute creating such lien must be strictly construed. Such statutory lien cannot be enlarged by construction."

See, also,

Creighton v. *Manson*, 27 Cal., 614.
State v. *Newark*, 42 N. J. L., 38.
Howell v. *Essex Co.*, 32 N. J. Eq., 672.
Garretson v. *Schofield*, 44 Iowa, 37.
Otoe Co. v. *Mathews*, 18 Neb., 466.
Myers v. *Burritt*, 60 Conn., 122.
New England L. & T. Co. v. *Young*, 81 Iowa, 738.
Philadelpnia v. *Greble*, 38 Pa. St., 339.
Board of Education v. *Old Dominion Iron, etc., Co.*, 18 West Va., 441.

Kentucky Central R. R. Co. v. *Commonwealth*, 92 Ky., 64.
Tousey v. *Post*, 91 Mich., 631.
Anderson v. *State*, 23 Miss., 459.

II.

The taxes levied by the collector on June 7, 1897, upon the roll of 1896 became payable one-half on the first day of the following January, and the other half on the first day of July in the following year, under the provisions of sections 4052 and 4056 of the Compiled Laws of 1897, ~~as amended by sections 12 and 14 of chapter 61 of the Laws of New Mexico of 1899.~~ (See Appendix.) It appeared, therefore, to the court from the statement of the territory made before it that the territory had commenced this proceeding to recover taxes which were first levied after the court had parted with the possession of the property, on which they were levied, and that at the time when the proceedings were instituted no part of the taxes sought to be recovered could become due until more than six months after the filing of the petition in intervention. The court and everyone else but the territory had supposed, and had the right to suppose, prior to this statement by the territory, through its solicitor, Mr. Clancy, that these additional assessments and the levy of taxes thereon, which were sought to be enforced, had been made in the year 1896, between the first day of August, in that year, and the first day of January, 1897.

None of the questions here presented could have been presented to this court when this case was previously before it.

The territory having taken the former appeal from the order of the District Court dismissing the intervening petition had caused to be certified to the Supreme Court of the territory such part of the record in the foreclosure case as it deemed essential to present the questions sought to be raised by it and in taking the appeal from the Supreme Court of the territory to this court, it brought to this court only that part of the record that it had taken to the Supreme Court of New Mexico. The part of the record in the foreclosure case presented to this court on the former hearing of this matter consisted only of the bill to foreclose, the order appointing the receiver, the intervening petition filed by the territory, and the pleas thereto filed by the receiver and the United States Trust Company, and the order dismissing it. Nothing appeared in that transcript before this court to show that any final decree of foreclosure had been entered, much less that the property had been sold, or that the taxes sought to be recovered were levied for the first time a month after the sale of the property and its confirmation under a final decree in the foreclosure case.

SECOND POINT.

The District Court erred in overruling the plea in abatement, filed on the 27th day of September, 1899, and the Supreme Court of the Territory of New Mexico erred in affirming such ruling.

After the motion to dismiss was overruled by the District Court, the court, upon application of the receiver, and the United States Trust Company, made an order permitting such parties to withdraw the pleas in bar which they had filed to the intervening petition on the 23rd day of June, 1897, and authorized the parties to file a plea in abatement to the matters contained in the intervening petition. (Tr., pp. 129, 130.)

I.

The order of the court allowing the withdrawal of the former pleas in bar, and the filing of a plea in abatement, was an order which the court had a right to make, in its discretion.

Eberly et al. v. *Moore et al.*, 24 How., 147.
Elder v. *Bank*, 17 Wall., 551.
Kern v. *Huderkoper*, 103 U. S., 485.

This action was sustained by the Supreme Court of New Mexico. (Tr., p. 327.) We believe that it was proper to file the motion which was filed to dismiss the action.

Morris v. *Gilmore*, 129 U. S., 316.
Shreveport v. *Cole*, 139 U. S., 36.

Yet, out of an abundance of caution it was deemed best to file a plea in abatement, raising the same questions as

were raised by the motion to dismiss. The material questions raised by the plea in abatement, which we rely upon, have heretofore been fully discussed, with reference to the ruling of the court upon the motion to dismiss. However, we call the court's attention to the fact that the plea in abatement was set down for argument, and, upon argument, was held insufficient, in law and in equity, to abate the intervening petition. This action leaves the several matters stated in the plea in abatement as absolutely true, and the ruling of the court thereon must be adjudged upon the assumption that everything stated in such pleas was true and correct.

THIRD POINT.

The District Court erred in overruling each of the grounds of demurrer specified to that portion of the intervening petition which alleged taxes to be due upon an additional assessment of the property in controversy, for the year 1892, upon the assessment roll of 1896, alleged to have been assessed in the sum of $394,550, and the Supreme Court erred in affirming such ruling.

After the plea in abatement was overruled, Mr. Smith and the trust company filed a joint and several demurrer to the intervening petition. (Tr., pp. 132–150.) This demurrer was partially overruled and partially sustained. (Tr., pp. 130, 131.)

For the convenience of the court, we herein copy that portion of the intervening petition to which the demurrer was overruled, to-wit:

"The said collector, for the year 1892, entered upon his tax list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof, from which it appears that the total valuation of said property amounted to $620,390. The tax regularly levied by the proper authorities upon all property within said county for the year 1892, for territorial and county purposes, was at the rate of twenty-one and nine-tenths mills, so that the amount of tax upon the valuation aforesaid amounts to $13,586.54, one-half of which became delinquent upon the first day of January, 1893, and the other half on the first day of July, 1893, said halves bearing interest respectively, from said respective dates, at the rate of twenty-five per centum per annum." (Tr., p. 51.)

The copy of the exhibit referred to in this allegation is as follows:

"ADDITIONAL ASSESSMENT FOR THE YEAR EIGHTEEN HUNDRED AND NINE-TWO.

The following was omitted in the assessment of the year 1892 and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued and assessed by the collector: * * *

Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said County of Valencia and constituting 'improvements' upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile, $394,550." (Tr., p. 53.)

GROUNDS OF DEMURRER TO THE PORTION OF THE INTERVENING PETITION ABOVE SET OUT

"And C. W. Smith, as such receiver, and the United States Trust Company doth further jointly and severally demur as to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him as such receiver of the property in his custody as such receiver for the same upon an assessment made by the collector of said county in the year 1896, for the year 1892, as and for an additional assessment of such property for the year 1892 and which is alleged to have been assessed at the sum of $394,550, and for cause of demurrer saith:

1. That said portion of said intervening petition referred to is without equity, in respect to the claim of the territory to collect taxes levied upon the assessment made in 1896, for the year 1892.

2. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1892, at the sum of $394,550, as aforesaid.

3. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety, discloses that the property alleged to have been listed at the valuation of $394,550 had any of the taxes sought to be recovered assessed against it by the collector, or any other person, upon such assessment.

4. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic and Pacific Railroad Company, or to its receivers, or any other person or persons.

5. That upon the face of the facts stated in said portion of said intervening petition, the property assessed at the said sum of $394,550 was assessed as personal property, and not as real estate, although the same appears to have been and is shown by said intervening petition to have been real estate, capable of being described as such sufficiently in accordance with the requirements of the statutes of New Mexico for the assessment of real estate.

6. That it is impossible to ascertain from the facts stated in the intervening petition concerning the assessment made in 1896 for the year 1892, as to what exact mileage of right of way of the Atlantic and Pacific Railroad Company is claimed in said intervening petition to have been acquired by the Atlantic and Pacific Railroad Company from any person, persons or corporations other than the government of the United States, or from any lands other than public lands." (Tr., pp. 134–135.)

That all the property included in this additional assessment was, and is, real estate under the provisions of section 2807 (see Appendix) of the Compiled Laws, is settled beyond any question of doubt by the decision of this court in the case of the *Territory of New Mexico* v. *The United States Trust Company* (172 U. S., 171).

Section 2834 (see Appendix) provides for the making of an assessment book, or roll, in which are entered the different kinds of property to be assessed, etc.

Section 2835 (see Appendix) provides that each tract of land shall be valued and assessed separately, etc.

It will be seen by the sections referred to that the scheme provided for the assessment and taxation of property requires a list in writing made by the owner, or person in charge of property liable to assessment and taxation; but if the owner is absent, or unknown, and the property is not listed by anyone else, then the assessor himself makes the list.

By the provisions of sections 2847 and 2848 (see Appendix) omitted property when assessed by either the assessor or collector is to be listed as well as valued. It is perfectly evident that the list of property for assessment, whether made by the owner, person in charge, assessor or collector, must contain such a description of the real estate as is required by the provisions of section 2822.

The statutes referred to are practically copies of the statute in force in Montana, as will be seen by referring to the opinion of Justice Knowles in the case of *Powder River Cattle Company* v. *Board of Commissioners*, 45 Fed., 325.

The Supreme Court of Montana, in construing this statute in the case of the *N. P. R. R. Co.* v. *Carland* (5 Montana, 146, 3 Pac. Rep., 134), holds that the necessity of the description required by the statute, of real estate, separate and by itself, is a necessary part of the statement, and an assessment of property which does not comply with it is absolutely void. To the same effect is the decision of Justice Knowles above referred to.

This court in the case of *Lyon* v. *Alley* (130 U. S., 177) lays down the rule as follows:

"When the requisitions prescribed for the assessment and collection of taxes are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and gener-

ally would be injuriously affected, they are not directory, but mandatory, and must be followed.

Provisions of statutes as to the form and mode of assessments, and the place where the tax lists are to be deposited, are designed for the benefit of the taxpayers and the protection of their property from sacrifice."

See also to the same effect:

French v. *Edwards*, 13 Wall., 506.
Bird v. *Benliss*, 142 U. S., 664.
Van Cise et al. v. *Carter*, 68 N. Y., 539.

The exhibit showing the details of this assessment discloses that there were 93.7 miles of these improvements on the right of way of the railroad company in Valencia County, 33 miles of which were by the statements made in the assessment exempt from taxation, and from the same statements 60.7 miles were not exempt, and that these 60.7 miles of this total mileage which were not exempt were assessed in gross at $394,550. (Tr., p. 63.)

Whether these 60.7 miles that were subject to taxation according to the statements made in this assessment, were together, in a continuous line, or separated by any of the miles that were exempt, does not appear. This assessment was, and is, precisely like an assessment of 63.7 acres of land in a tract of 93.7 acres, without any description to identify any one of the 63.7 acres from any other one of the 93.7 acres. Would it be possible for the owner, or for anyone else, to determine where any one of the 60.7 miles that entered into this assessment was located in the total mileage of 93.7 miles in Valencia County? Was this such a description as the mandatory provisions of the statute required?

As an answer to this question we quote from the decision

of the Supreme Court of Nebraska in the case of *Johnson County* v. *Tierney et al.* (76 N. W., 1090), as follows:

"The assessment and taxation of lot 5 for 1882 and 1883 was under this description: 'Part of lot 5.' This designation, considered by itself, or in connection with the evidence contained in the record before us, furnishes no means by which we can determine, or even conjecture, what portion of the property is charged with the taxes. It was not a fractional lot. It was all owned by the heirs of Mary A. Tierney. It was all subject to taxation, yet only a part of it was taxed. We cannot say what part, and therefore hold that the taxes are void. *Lessee of Massie's Heirs* v. *Long*, 2 Ohio, 287; *Lessee of Mathews* v. *Thompson*, 3 Ohio, 272; *Ronkendorff* v. *Taylor's Lesee*, 4 Pet., 350; *Burchard* v. *Hubbard*, 11 Ohio, 316; *Raymond's Lessee* v. *Longworth*, 14 How., 76; *People* v. *Flint*, 39 Cal., 670; *Atwell* v. *Zeluff*, 26 Mich., 118; *Sims* v. *Warren*, 67 Miss., 278, 7 South, 226."

We also quote the first point in the syllabi in the decision of the Supreme Court of Louisiana in the case of *Augusti et al.* v. *Lawless et al.* (14 Southern 228):

"An assessment that does not contain a description sufficient to identify the property assessed is illegal and void, and therefore beyond the healing power of the curative statute of 1884, a sufficient description of the property being an indispensable prerequisite to the exercise of the taxing power."

We also quote the third point of the syllabi in the decision of the Supreme Court of Michigan in the case of *Jackson* v. *Sloaman*, 75 N. W., 282, as follows:

"In assessment proceedings, the description of the land must be sufficiently definite and certain as not to require resort to extrinsic proof that a particular piece of land was designated."

See, also,

Jones v. *Pelham*, 84 Ala., 208.

People v. *Mahoney*, 55 Cal., 286.

Raymond v. *Longwood*, 14 Howard, 76.
Turner v. *Yeoman*, 16 Ohio, 25.
Symmes v. *Warren*, 67 Miss., 278.
People v. *Hyde*, 48 Cal., 431.
Ainsworth v. *Dean*, 21 N. H., 400.
Treon v. *Emerick*, 6 Ohio, 391.
Cooley on Taxation, 281.
Jory v. *Palace Dry Goods and Shoe Co.* (Ore.), 46 Pac., 786.
Van Cise et al. v. *Carter*, 68 N. W., 539.

II.

As before stated, the intervening petition was required to set forth sufficient facts to show that the tax sought to be recovered was a valid and legal tax, which was a lien upon certain real estate, describing it. (See section 4157, Compiled Laws New Mexico, Appendix.)

State v. *Howard*, 80 Ind., 466.
People v. *C. P. R. R. Co.*, 83 Cal., 393.

The collector acting under the authority of section 2848 of the Compiled Laws of 1884 (see Appendix) was required "to list, value and assess such property." The requirement that the collector should assess such property after its valuation was a requirement that he should extend the taxes levied against its value.

Savings Bank v. *United States*, 19 Wall., 227.
People v. *Weaver*, 100 U. S., 545.

The intervening petition fails to allege any extension of any tax against the valuation of the property. It simply alleged the valuation made by the assessor, and

then the rate of taxation which was in force during the year 1892; it nowhere alleged that the collector entered upon the tax rolls any tax against this valuation; hence the third ground of the demurrer should have been sustained.

State v. *Perkins*, 24 N. J. L., 409.
Seymour v. *Peters*, 67 Mich., 415.
C. M. & St. P. Ry. Co. v. *County of Cossuth*, 41 Iowa, 57.
Barker v. *Early*, 33 Mo., 677.
Moon v. *Marsh*, 40 Kansas, 58.

~~THIRD POINT.~~

III

The demurrer contained the same grounds of demurrer to each one of the additional assessments made for the years 1893, 1894, 1895 and 1896 as those which we have presented in relation to the additional assessment for the year 1892. We therefore claim that the court erred in overruling each one of these grounds of demurrer to each of the other claims, upon the same grounds and for the same reasons as heretofore stated in relation to the demurrer to the assessment for 1892, hence it is unnecessary to repeat the argument already made.

FOURTH POINT.

The District Court erred in overruling the joint and several plea in bar, filed to the intervening petition on the 30th of September, 1899, and the Supreme Court of the Territory erred in sustaining such ruling.

Upon the disposition of the demurrer by the District Court, the appellants filed, by leave of the court, a plea in bar to the intervening petition. (Tr., pp. 151-212.) Previous to its filing, it was agreed between the parties and the court that such plea might embrace every fact, in one plea, that could be inserted in a plea, "regardless of whether or not such facts, or any of them, ought, under strict rules of pleading, to be required to be embraced in separate pleas." (Tr., p. 131.) On October 5, 1899, an agreed statement of facts was filed in the cause. (Tr., pp. 212-288.) This agreed statement of facts contained, among other things, the following provision:

"That any point stated in such plea, where modified, changed, or otherwise stated herein, shall be deemed to have been stated in the plea as herein stated, and to save the time that might be taken by joining issue of fact on such plea, it is further agreed that any fact herein stated, and not stated in said plea which may be material, may be considered by the court as plead in the plea upon the hearing of its sufficiency." (Tr., p. 288.)

On the same day, the plea was set down for argument, and upon argument was overruled. (Tr., p. 288.)

FIRST.

The additional assessment of the property alleged in the intervening petition to have been placed by the collector on the tax rolls of 1896, as property omitted from the assessment roll of 1892 to 1896, inclusive, was property which had been placed upon the assessment rolls of 1892 to 1896, inclusive, at the proper time, by the assessors of Valencia County; therefore, not being property omitted from the assessment rolls of 1892 to 1897, the action of the collector in placing the same upon the tax list for 1896, as "additional assessments," was without jurisdiction, and void.

I.

The plea and agreed statement of facts in this case disclose that in 1892 the Atlantic and Pacific Railroad Company, at the proper time, made a return to the county assessor of Valencia County of all the property of the railroad company situated in that county, claiming, however, that the right of way described in such return was exempt from taxation. The county assessor, at the proper time in that year, entered upon the assessment roll, as the assessed total value of the right of way of the Atlantic and Pacific Railroad Company, the sum of $327,103, against which was extended upon the tax roll of that county for that year the taxes levied upon such assessment, the total being the sum of $8,501.24. The assessment roll containing this assessment was properly approved by the board of county commissioners of Valencia County, and a warrant issued to the collector to collect the taxes mentioned. (See plea, Tr., pp. 152, 153; agreed statement of facts, Tr., p.

277, and Exhibits 1, 2 and 3, attached to plea, Tr., pp. 169–173.)

This assessment of the right of way being based upon the return made by the railroad company estopped it and its receivers from questioning the sufficiency of the description contained in it.

Moody et al. v. *City of Galveston* (Tex.), 50 S. W., 481.

Jory v. *Palace D. G. Co.*, 46 Pac. (Oreg.), 789.

Lake County v. *Sulphur Bank Mining Co.*, 68 Cal., 14.

People v. *Atkinson*, 103 Ill., 45.

Pingree v. *Berkshire County*, 102 Mass., 76.

American Union Express Company v. *St. Joseph*, 66 Mo., 675.

Matthews v. *Kansas*, 80 Mo., 231.

Sage v. *Burlingame*, 74 Mich., 120.

Leonard v. *Madison County*, 64 Iowa, 418.

Baraboo Water Works Co. v. *Rice County*, 44 Minn., 12.

As was said by Justice McKenna, in delivering the opinion of the court on the hearing granted in the former appeal, in speaking of the return made by the railroad company, and the entries upon the assessment roll, which were shown by the pleas to the intervening petition (then being considered by the learned justice):

"The right of way therefore was assessed in 1892, and whatever taxes were due on it, or any part of it, were left delinquent. * * * It is manifest that the right of way was assessed and the taxes were delinquent." (174 U. S., 550.)

It must be clear that if the right of way in Valencia

County was placed by the assessor upon the assessment roll for 1892, such right of way included every item of property embraced in the "additional assessment" for 1892. This point was expressly determined by this court in a case between the same parties. (172 U. S., 171.) The property embraced in the "additional assessment" for the year 1892, described in the intervening petition, was not, therefore, property omitted from the assessment rolls of 1892, and hence the collector, under the provisions of section 2848 of the Compiled Laws of New Mexico of 1884 (see Appendix), had no jurisdiction to place such "additional assessment" upon the rolls of 1896. The authority granted by sections 2847 and 2848, to put an "additional assessment" upon the tax roll in his hands, is only granted when such property has been omitted from the assessment rolls of any previous year. If the property involved was actually placed upon the assessment roll for 1892, by no matter how defective a description, the fact of its being named there prevented the right of the collector to act under the sections named.

Lehrman, Durr & Co. v. *Robinson et al.*, 59 Ala., 219.

Allwood v. *Cowen*, 111 Ill., 481.

II.

In 1893 the assessor of Valencia County entered upon the assessment roll at the proper time the assessment of the right of way of the Atlantic and Pacific Railroad Company in the sum of $327,103, which was raised by the board of county commissioners to $391,640.24, and against which the taxes were extended upon the tax rolls, amounting, in the total, to the sum of $7,353.09. (Exhibit 7, Tr., pp.

186, 187.) Subsequently, on June 4, 1894, Mr. Luna (who as collector made these "additional assessments" on June 7, 1897) filed in the foreclosure suit then pending in the District Court below, of the *Mercantile Trust Co* v. *Atlantic & Pacific R. R. Co.* (a suit to foreclose a second mortgage), an intervening petition and an amended intervening petition to collect the taxes alleged to have been levied against the assessment of the right of way on the tax rolls of 1892 and 1893. (See Tr., pp. 175-183.) It will be observed that in these intervening petitions Mr. Luna alleges the due assessment of the right of way by the proper officer, at the proper time. These intervening petitions were verified by Mr. Luna. Mr. Luna, therefore, had full and complete knowledge of the assessment of the right of way in Valencia County for the years 1892 and 1893, at the time when he attempted to make an "additional assessment" of omitted property, and hence acted upon the assumption ~~only~~ only that the property omitted for the years involved was the superstructure which, in his then opinion, was not a part of the right of way placed upon the assessment rolls for those years. If there was any inaccuracy in the description of the right of way, it might have been remedied by the taxing officers, as claimed by Mr. Luna, in his amended petition in intervention under the provisions of section 2883 of the Compiled Laws of New Mexico of 1884. (See Appendix.)

III.

In the year 1894 there was placed by the assessor for Valencia County at the proper time on the assessment rolls under the name of Atlantic and Pacific Railroad Company as owner, "93.458 miles main track" assessed at $6,500 a mile; total, $607,477.90, against which the taxes for that year were extended. (See Exhibit 9, Tr., pp. 193, 194.)

IV.

In 1895 there were placed upon the assessment roll by the assessor at the proper time an assessment under the name of the Atlantic and Pacific Railroad Company, as follows:

"Cross-ties, rails, fish-plates, spikes, culverts, bridges, depots, turntables, side tracks, buildings and entire superstructure on right of way, 93.7 miles, in Valencia County, at $6,500 per mile." (See Exhibit 11, Tr., p. 199.)

It will be observed that this description was practically the same description employed in the "additional assessments" for that year.

Making a total assessment of $609,050, against which the taxes were extended on the tax rolls for that year. (See Exhibit 11, Tr., pp., 199, 200.)

V.

In 1896 the assessor of that county in due time placed upon the assessment roll under the name of the Atlantic and Pacific Railroad Company an assessment reading as follows (see Exhibit 13, Tr., pp. 205, 206):

"Cross-ties, rails, fish-plates, spikes, culverts, bridges, depots, turn-tables, side tracks, buildings and entire superstructure on right of way, 93.7 miles, in Valencia County, at $6,500 per mile." (See Exhibit 13, Tr., pp. 205, 206.)

Against which the taxes were extended on the tax rolls for that year.

The allegations in the plea concerning these matters are found in the transcript at pages 152 to 167, and in the agreed statement of facts at pages 176 to 283, ~~and these allegations are agreed to be true in the agreed statement of facts. (Tr., pp. 277–280.)~~

VI.

Sections 2847 and 2848 of the Compiled Laws of New Mexico of 1884 constituted the only authority upon which the collector acted in making the "additional assessments" set out in the intervening petition, and while set out in the appendix we here copy them for convenience of the court:

"Sec. 2847. If by any means any property shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same when discovered shall be listed by the assessor and placed upon his roll before the same is returned to the board of county commissioners, with all arrearages of taxes which should have been assessed and paid in former years charged thereon, or in case of failure of the assessor, the same shall be assessed by the collector in the manner provided in the next section,

"Sec. 2848. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate, or any personal property then in his county are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list following the entries made by the clerk (and such entries shall be designated as "additional assessments"), and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the board of county commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him."

The assessment referred to in section 2847 means not only the listing of the property upon the assessment roll, but its valuation.

Cooley on Taxation (2nd Ed.), page 251.

The property described in the "additional assessment" made by the collector on June 7, 1897, was certainly listed upon the assessment and tax rolls for each of the years of 1892 to 1896, inclusive, and it was also valued for each of these years at the proper time in each of these years by the officers whose duty it was to list such property upon such rolls, ~~and it was also valued for each of these years;~~ the fact that there was included within the listing property which was exempt, as well as property not exempt from taxation, does not affect the question as to whether any of such property was omitted in the assessment of any year. Everyone must concede that under the decisions of this court referred to the listing of the right of way on the assessment roll by the assessors in each of the years in controversy included the identical property which the collector claimed had been omitted from the assessment rolls of former years, and that the placing of it upon the tax rolls for each of the years, with the extension of taxes against it, precluded the collector from acting under the sections referred to, in 1897, even though the assesment and the taxes extended to it were void, because of the including of property exempt, and not exempt from taxation in the one assessment and the one levy.

The improvements upon real estate in New Mexico are not separately assessed from the real estate to which they are attached. Sec. 3017, Compiled Laws 1884 (Appendix).

The county officials of Bernalillo and Valencia Counties, and the learned counsel for the territory, Mr. Clancy, had persuaded themselves long prior to the time of making these "additional assessments," that the superstructure placed upon the right of way of the Atlantic and Pacific Railroad Company constituted no part of such right of way, and was not therefore included in any assessment of the right of way, as such. It was upon this theory that the appeal which was heard by this court in the case of *New Mexico* v. *United States Trust Company* (172 U. S., 171) was taken from the decision of the Supreme Court of New Mexico to this court. This appeal was pending and not yet heard by this court when these "additional assessments" in controversy were made on June 7, 1897. Acting upon this theory only, the collector, on June 7, 1897, claimed that the superstructure on the right of way in Valencia County had been omitted from the assessment and tax rolls of Valencia County for the years 1892 to 1896, inclusive. It will be seen, by referring to the intervening petition and its exhibits (Tr., pp. 50–57), that this view of the theory upon which the county officials acted is correct, because no part of the right of way as such was attempted to be placed upon the tax rolls by the collector in making his "additional assessments." Everything placed upon the tax rolls by the collector was a part of the superstructure upon the right of way, which was subsequently determined by this court to be a part of the right of way itself. This court having afterwards de-

termined (on December 5, 1898) that the property placed upon the tax rolls by the collector as "additional assessments" was real estate, and a part of the right of way itself, practically determined that this action of the assessor, based upon the statutes referred to, was null and void, under the facts presented.

SECOND.

Under the allegations in the plea, supplemented by the statement of facts agreed upon, the collector of Valencia County was without jurisdiction to make the "additional assessment" alleged to have been made by him upon the tax list of 1896, even though the property so assessed was omitted from the assessment rolls, or tax lists, for the years 1892 to 1896, inclusive.

I.

Admitting, for the sake of the argument only, that the property placed by the collector upon the tax lists of 1896 on the 7th day of June, 1897, was property which had been omitted from assessment and taxation during the years 1892 to 1896, inclusive, we say:

That the action of the collector in listing such property upon the tax list of 1896 on the 7th of June, 1897, was without authority or warrant of law. The collector could only act after the tax list of 1897 had been placed in his hands, and then his assessment of the property previously omitted was required to be made upon that tax list, and was not authorized to be made upon the tax list of 1896. A valid assessment by the officers appointed by the law was at that time a prerequisite to the levying of any valid taxes on taxable property in Valencia County. As stated by Justice Cooley (Cooley on Taxation, 2nd Ed., page 352):

"An assessment when taxes are to be levied upon a valuation is obviously indispensable. It is required as the first step in the proceedings against individuals subjects of taxation, and is the foundation of all which fol

lows it. Without an assessment they have no support, and are nullities. The assessment is, therefore, the most important of all the proceedings in taxation, and the provisions to insure its accomplishing its office are commonly very full and particular. * * * The assessment must, therefore, be made by the proper officers or it will be void."

This court has fully approved the doctrine of the text quoted, in the case of *Hager* v. *Reclamation District* (111 U. S., 710.)

Under the scheme of taxation created by the revenue laws of New Mexico in force in the year 1897, all property subject to taxation in Valencia County for that year was, in the first instance, to be assessed by the county assessor after having been listed by the owner, if the owner could be found. If there was taxable property in that county which had escaped taxation for any previous year or years, and was discovered by the assessor previous to turning his rolls over to the county board of equalization, he was required to list such property upon his assessment roll, with all arrearages and taxes which should have been assessed and paid in former years charged thereon. The roll, when completed, was under the oath required to be taken by the assessor, and to be turned over to the county board of equalization, meeting on the first Monday of June in that year, and this board was authorized to supply any omissions and correct any assessments, etc. At such meeting, or at some subsequent session, the board of county commissioners were required to approve such assessment roll. Under these laws the assessor had in his possession, from the first day of March until the first Monday of June, the assessment roll. Of this and the fact that he was required to list thereon and value all taxable property that had escaped taxation for previous years in that county, everyone not only had notice, but the laws referred to protected the right of

everyone by giving to every person whose property was listed upon such rolls an appeal, not only to the county board of equalization, but from its action to the territorial board of equalization, and these appeals when taken were to be heard and disposed of before any taxes became final. This right of appeal was given by these statutes to the owner of property placed upon the tax rolls as property which had escaped taxation in previous years.

(See decision of this court upon a very similar statute in the case of *Winona & St. Peter Land Co.* v. *State of Minnesota*, 159 U. S., 534.)

While it was the duty of the assessor and the county board of equalization to act between March 1st and August 1st of 1897, there was not only no reason for but no authority conferred by the statutes upon the collector to act prior to the tax list of 1897 being turned over to him. The warrant to the collector to act in any case was only granted by the statute "in case of the failure of the assessor" to place the omitted property upon the tax list of that year. (See section 2847, Appendix.)

The collector did not have to take any oath concerning an assessment to be made by him, and from him no appeal was given by these statutes, except to the board of county commissioners, which would only meet after he could act in the October following in that year, and the first Monday of January in the succeeding year. (See section 2848, Appendix.) If the legislature had contemplated any action on the part of the collector prior to the time of receiving the tax list, it certainly would have granted an appeal to the county board of equalization, which meets in June and July, instead of granting the appeal to the board of county commissioners, and from whom no appeal could be taken to the territorial board of equalization.

By the provisions of the statutes every taxpayer whose property appeared upon the assessment rolls in any given year had the right to two appeals, one to the county board of equalization and the other from that to the territorial board of equalization, but in case of action on the part of the collector in placing property as omitted property on a tax list in his possession, but one appeal is granted, the legislature evidently intending that such action would not take place until after it would be too late to allow an appeal to either the county or the territorial boards.

It was alleged in the plea under consideration that at the time when the collector acted in placing these "additional assessments" on the tax list of 1896, to-wit, on June 7, 1897, the assessor of the county had in his possession and under his control the assessment rolls for 1897. (Tr., p. 155.) In the agreed statement of facts it was agreed as follows:

"That on June 7, 1897, the county assessor of said county had in his possession the assessment rolls of said county for the year 1897, but they were not then completed and were completed, verified and turned over by the assessor on the 6th of Sepeember, 1897. That the assessment so made by Solomon Luna on June 7, 1897, upon the tax lists of 1896, were never presented to nor approved by the board of county commissioners of said county."

II.

It has been many times asserted by this and many other courts, that any revenue law must provide for some kind of notice to the taxpayer of the assessment and levy of taxes upon his property.

Davidson v. *New Orleans*, 96 U. S., 97.

Hagar v. *Reclamation District*, 111 U. S., 701.

Bellingham Bay & Co. v. *New Whatcom*, 172 U. S., 318.

Patten v. *Green*, 13 Cal., 325.

Hagenmeyer v. *Board of Equalization*, 82 Cal., 214.

Darling v. *Gunn*, 50 Ill., 424.

People v. *Ward*, 105 Ill., 620.

South Platte Land Co. v. *Buffalo County*, 7 *Neb.*, 253.

Alleghany County v. *New York Min. Co.*, 76 Md., 549.

State v. *Parker*, 34 N. J. L., 49.

State v. *Carragan*, 37 N. J. L., 264.

State v. *Harrison*, 39 N. J. L., 51.

Auer v. *Dubuque*, 65 Iowa, 650.

Avery v. *East Saginaw*, 44 Mich., 587.

Thomas v. *Gain*, 35 Mich., 155.

24 Am. Rep., 535.

Dool v. *Cassopolis*, 42 Mich., 547.

Mauer v. *Cliff*, 94 Mich., 194.

Relfe v. *Columbia L. Ins. Co.*, 11 Mo. App., 374.

Scott v. *Brackett*, 89 Ind., 413.

Kuntz v. *Sumption*, 117 Ind., 1.

Santa Clara County v. *Southern Pac. Ry. Co.*, 18 Fed. Rep., 385.

French v. *Edwards*, 13 Wall. (U. S.), 506.

Albany City Nat. Bank v. *Maher*, 19 Blatchf. (U. S.), 179.

Exchange Bank Tax Cases, 21 Fed. Rep., 99.

Dean v. *Aiken*, 48 Vt., 541.

Alabama, etc., R. R. Co. v. *Brennan*, 69 Miss., 103.

Kansas Pac. R. Co. v. *Russell*, 8 Kan., 558.
Gibbons v. *Adamson*, 44 Kan., 203.
New Orleans v. *St. Romes*, 28 La. Ann., 17.
New Orleans v. *Stewart*, 28 La. Ann., 180.

The statutes in force at the time, authorizing the assessment of any property in that county, in 1897, that was omitted from the assessment rolls of previous years, would be notice to the owner (under the decisions of this court) that the assessor might discover the omission in the previous year or years and place the property so omitted on the assessment rolls for that year; that the county board of equalization might discover it and place it upon the rolls at its June session of that year, or that if the assessor and the county board of equalization failed to discover it and place it upon the assessment roll, prior to the first day of August of that year the collector himself might discover it, and place it upon the tax list; but these statutes were not notice to the owner of such property, or anyone else, that the collector of that county, in June, 1897, might place this property upon the tax list of 1896. It is alleged in the plea under consideration that no notice was ever given of the action of the collector on June 7, 1897, by the collector, or anyone else to the purchasers at the sale, or their assignee, the Santa Fe Pacific Railroad Company, beyond such notice as might have been given by the filing of the intervening petition (Tr., p. 155), and this allegation is admitted to be true in the agreed statement of facts. (Tr., p. 284.)

THIRD.

The taxes sought to be recovered in the intervening petition did not exist until after the property was sold and delivered by the court to the purchasers.

The plea shows that on the 3rd of May, 1897, the property was sold, and the sale confirmed on the 4th of May, 1897; that a deed of conveyance was made to the purchasers on the 2nd of June, 1897; that on the 22nd day of June, 1897, the purchasers sold and conveyed the property to the Santa Fe Pacific Railroad Company, created under the act of Congress approved March 3, 1897; that on the 1st day of July, 1897, the property was delivered by the receiver to the Santa Fe Pacific Railroad Company, the assignee of the purchasers. (Tr., pp. 154–156.) These allegations were admitted to be true in the agreed statement of facts. (Tr., pp. 283, 284.)

There was no statute in New Mexico requiring the making of these taxes, when levied, to relate back to any previous time, or date, and whether rightfully levied by the collector, or not, they could only become due on the first of January, 1898.

Winona & St. Peter Land Co. v. *State of Minnesota, supra.*

We refer to the argument heretofore made upon this point, on the motion to dismiss.

FOURTH.

Every point, argument and authority presented herein in support of the motion to dismiss, and the plea in abatement, is applicable in support of this plea in bar, because of the fact that all the facts on which the motion to dismiss, and plea in abatement, were based, *dehors* the record, were made to fully appear by the admitted truth of the facts stated in the plea in bar, also the admitted facts stated in the agreed statement of facts.

The plea alleged, and the agreed statement of facts admitted: That this property was sold, under the decree of the court, on May 3, 1897; that the sale was confirmed on May 4, 1897; that a deed of conveyance, in accordance with the decrees, was executed by the master to the purchasers on June 2, 1897; that on June 22, 1897, the purchasers conveyed the property sold to the Santa Fe Pacific Railroad Company; that on July 1, 1897, at the request of the purchasers, the receiver delivered possession of the property sold to the Santa Fe Pacific Railroad Company; that the taxes in controversy were first levied, and first became a charge upon the property, on June 7, 1897; that the receiver was discharged in October, 1898.

Upon these facts it is clear that the court had no jurisdiction to proceed further with the hearing of the matters set out in the intervening petition. While the questions of law arising from these facts have heretofore been discussed, we again call the attention of the court to them, on account of the facts being alleged in the plea, and admitted by the agreed statement of facts to be true, so that

if for any reason any of these matters could not be considered upon the motion to dismiss, or the plea in abatement, the court can consider them upon the questions arising under the plea in bar upon the agreed statement of facts.

FIFTH POINT.

The Supreme Court of New Mexico erred in its determination that fifty-five and one-half miles of the right of way formerly belonging to the Atlantic and Pacific Railroad Company, and owned by the Santa Fe Pacific Railroad Company, or any portion thereof, was subject to assessment and taxation for the years 1892, 1893, 1894 and 1895, in Valencia County.

The District and Supreme Courts below severally determined that that portion of the right of way of the Atlantic and Pacific Railroad which crosses certain alleged Spanish grants was right of way acquired from private ownership and was therefore not exempt from taxation, under the second section of the Atlantic and Pacific charter (Tr., pp. 292–314) as construed by this court.

The facts concerning the portion of the right of way which passed over these Spanish grants are set out in full in the agreed statement of facts. (Tr., pp. 212–272.) The title papers covering each grant referred to are fully shown in the agreed statement of facts. Under the facts agreed upon we claim:

Under the act of Congress creating the Atlantic and Pacific Railroad Company the right of way granted over the public domain included a right of way over lands claimed under alleged Spanish or Mexican grants, the title whereto was not perfect at the date of the act, or which had not been definitely segregated from the public domain, or where there existed any power of disposition in the United States by reason of the peculiar nature or character of the alleged claim or grant.

In *New Mexico* v. *United States Trust Company*, 174 U. S., 545, this court held that the part of the right of way which was granted under section 2 of the act of Congress in question, together with the superstructure thereon, was exempt, but the part of the right of way which was acquired from private owners and not from the United States was not exempt. It must be admitted that in the above ruling this court has gone to the utmost limit, as will be readily seen by comparison with the decision in *Providence Bank* v. *Billings*, 4 Pet., 514, wherein was first announced by the Great Chief Justice the rule that an exemption from taxation would not be inferred from the fact that the charter contained no stipulation on the subject of taxation. A different question is now involved—was the right of way in question granted by Congress or not?

No part of the right of way in Valencia County was, however, acquired from private owners. At all times has this right of way been claimed by the railroad company under section 2 of the act of Congress, hereafter set forth. (Tr., pp. 212, 214, 217, 227, 232, 252, 259, 274, 277.)

The question now is not one of construction of the ex-

emption clause, but it is to be determined what part of the right of way could be successfully claimed as being granted under section 2 of the act of Congress; and the same rule of construction to determine what was so granted must be applied in this case as would be applied in a controversy between the railroad company and a private indvidual, in an action involving title to its right of way. It cannot be made fish for one purpose and fowl for another. Upon the question now involved as to what was granted under section 2 of the Atlantic and Pacific act, the rule is well settled in this court that the grant of right of way should be liberally construed so as to cover all lands or right of way which the United States had power to grant at the time of the passage of the Atlantic and Pacific act, and which would therefore include the right of way over all lands which the United States had the power at the time to dispose of. (See *United States* v. *Denver & Rio Grande Railway Company*, 150 U. S., 1.) There can, however, be no serious question as to the intent of Congress in respect to the extent of the grant. It would be a breach of good faith if the government were now to resort to a strained construction to defeat any portion of the grant intended to be made. It would not only be bad faith but bad morals to now by a strained construction defeat or curtail any part of a grant manifestly intended by Congress, after vast sums have been expended and after the government has been receiving for years the benefits and advantages of the railroad as a postal and military route stipulated for in this very grant. Some other department than the judiciary should be asked to perpetrate such a wrong.

Section 2 of the act of July 27, 1866, entitled "An Act granting lands to aid in the construction of a railroad and

telegraph line from the States of Missouri and Arkansas to the Pacific coast" (14 U. S. Stat. at Large, 292) provides:

"That the right of way through the public lands be, and the same is hereby granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed, and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of 100 feet in width on each side of said railroad where it may pass through the *public domain*, including all necessary grounds for station-buildings, workshops, depots, machine-shops, switches, side-tracks, turntables and water-stations," etc.

Section 3, which contained the grant of lands to aid in the construction of the railroad, granted

"Every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passes through any state and *whenever, on the line thereof, the United States have full title, not reserved*, sold, granted, or *otherwise appropriated*, and free from pre-emption or *other claims or rights*, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers."

It is obvious from the foregoing that the right of way was intended to be granted over all lands which were con-

sidered or regarded at the time as a part of the "*public domain*," whether such lands were or should be thereafter reserved or otherwise appropriated. Indeed, in respect to the right of way, the government intended to grant such right of way wherever it possessed any title or wherever it had the power of disposition. If this were not the intention, certainly some reservation, such as is found in section 3, would also have been placed in section 2 as a limitation upon the grant of right of way. This construction has been definitely settled by this court in several cases.

In *Railroad Co.* v. *Baldwin*, 103 U. S., 426, on pages 429 and 430 it was said in respect to a similar grant, as follows:

"But the grant of the right of way by the sixth section contains no reservation or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.

"The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would often be imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

"The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the

right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists."

The above noted distinction between a grant of the right of way over the public domain and of lands to aid in the construction of the road was also pointed out in *Bybee* v. *Oregon* and *California Railway Company*, 139 U. S., 679 and 680.

In *Missouri, Kansas and Texas Railway Company* v. *Roberts*, 152 U. S., 114, it was held that the act of Congress granting the right of way to the company subsequently known as the Missouri, Kansas and Texas Railway Company across the "public lands" in Kansas attached over lands in the Osage Reservation; that while the right of occupancy was in the Indians, yet the absolute fee or legal title remained in the government, and, therefore, the power to make the grant over such lands existed.

Mr. Justice Brewer held, in the case of *U. P. Ry. Co.* v. *Douglas County*, 31 Fed., 540, that under a similar act of Congress the Union Pacific Railway Company obtained a right of way over sections 16 and 36, the school sections which had theretofore been reserved by Congress in creating the Territory of Nebraska and which it was intended should be given to the future State of Nebraska.

He also states as a significant fact that the right of way through the school sections had been accepted without challenge for twenty years, and says: "This indicates the general understanding and is significant." The same is true with respect to the right of way in question over the alleged Spanish or Mexican grants.

This Congressional grant is a law as well as a conveyance.

When the location of the right of way was made the title thereto took effect by relation as of the date of the act.

M. K. & T. Ry. Co. v. *K. P. Ry. Co.*, 97 U. S., 497.

K. P. Ry. Co. v. *Atchison Co.*, 112 U. S., 417.

The Atlantic and Pacific Railroad Company was incorporated under the act of Congress approved January 27, 1866. Prior to March 12, 1872, it definitely located its line of railroad through Valencia County, and on March 12, 1872, filed with the secretary of the interior of the United States a map showing its line of definite location through the Territory of New Mexico. (Tr., p. 212.)

At that time there was no survey of lands made by the government or anybody else. No part of the right of way, when located, passed through cultivated, enclosed or occupied lands in Valencia County, except some small tracts cultivated by Indians in the Pueblos of Laguna and Acoma, hereafter noticed. (Tr., p. 212.)

In 1866 the interior department printed and published two maps, one of which purported to be a sketch map of public surveys in New Mexico and Arizona, the other a map of the United States and Territories, showing the extent of public surveys and other details. (Tr., p, 213.)

The railroad was built on the line of definite location through Valencia County in 1879 and 1880. (Tr., p. 213.)

It is apparent that about the time of the location of the line of road through Valencia County, from the communications of the interior department, that the lands through which the road was located in said county were regarded as part of the public domain. (See Tr., pp. 212-217.)

The railroad company at no time acquired title from private parties through purchase or condemnation, but has

at all times considered its title in Valencia County as derived under the grant in the act of Congress. (Tr., p. 286.)

As the line of road in Valencia County runs through several alleged Spanish or Mexican grants, the titles to which were subsequently confirmed and surveys thereof made, either under an act of Congress or some decree of the Court of Private Land Claims, it will be necessary to examine each particular grant to determine whether in each particular case at the time of the passage of the Atlantic and Pacific act or location of the right of way the alleged Spanish or Mexican grant had been perfected and the land segregated from the public domain. The decision of the Court of Private Land Claims upon any such title is of course in no sense conclusive or binding upon the railroad company or even relevant in this controversy, being *res inter alios acta*. By the very terms of the act creating the Court of Private Land Claims its decision is only binding as between the claimant therein and the United States. The decree of the Court of Private Land Claims has simply the effect of passing the title of the United States to such claimant at and as of the date of the decree entered, or survey made thereunder.

Joaquin Sedillo and Antonio Gutierrez Grants.

The railroad upon crossing the line between Bernalillo and Valencia Counties going west was located and built on land claimed under two Spanish grants, now known as Joaquin Sedillo and Antonio Gutierrez grants. The grant papers pertaining to each of the above named grants were a part of the archives of the government of Spain, received by the government of the United States from Mexico and in the custody of the surveyor general of New Mexico ever

since the organization of his office in 1855, but were never presented to the surveyor general of the Territory of New Mexico or filed or recorded in any public office in the Territory of New Mexico, except as aforesaid, prior to September 9, 1896, when a petition was filed in the office of the clerk or the Court of Private Land Claims, at Santa Fe, New Mexico, by the claimants to the land, of each grant separately against the United States. (Tr., p. 217.)

The petition in the Court of Private Land Claims was filed by J. Francisco Chavez. It states that on November 5, 1716, Captain Antonio Gutierrez presented to Felix Martinez, Governor and Captain-General of New Mexico, his petition asking for a grant of a piece of land below Isleta, and apparently at a distance of two leagues, which formerly had been held by Christobal de Tapia, and setting forth that the boundaries of said land "were on the north an arroyo de alamos, which comes down from the hills; on the south, the Pueblo of San Clemente; on the east, the Rio Del Norte, and on the west the hills of the Rio Puerco"; that on the same day and year said governor made to said petitioner the grant he asked for, and as Christobal de Tapia formerly enjoyed it and directed Captain Beltazar Romero to place the said petitioner in possession; that Gutierrez entered into possession and that there are no *persons in possession* of said land *or any part thereof* claiming adversely to the petitioner; that it is impossible to state even approximately the quantity of land embraced in said grant, *as no survey thereof has ever been* made, but it is estimated to be between fifteen and twenty thousand acres; that no claim for said grant was considered or acted upon by Congress or the authorities of the United States, or heretofore been submitted to the authorities constituted by the law for the adjustment of land titles within the

limits of New Mexico; that the arroyo del alamos cannot now be identified if it still exists. (Tr., pp. 218–221.)

Copy of the petition of Gutierrez and the alleged grant are set out on transcript pages 219 to 220.

Gutierrez' petition to the governor recites that he is a resident of Albuquerque; that, being very much in need of lands on which to plant in order to support his family and *also to the end that his sheep may have room to scatter out*, and there being an uncultivated and unoccupied tract of land below Isleta, apparently at a distance of two leagues, which formerly was held by Christobal de Tapia, he asks a grant *in the same manner as it was held by said Tapia*, and that real possession be given to him, designating the boundaries and landmarks. In a note to the petition he describes the boundaries as follows: "On the north an arroyo with some cottonwood trees that comes down from the hills, on the south the Pueblo of San Clemente, on the east the Del Norte river, and on the west the hills of the Puerco river." This is followed by the alleged grant or decree by Martinez, which relates that it (the foregoing document) was presented by the party therein named; that he treated it as properly presented in accordance with law, and in view of the fact that it is his Majesty's will that his land should be settled and fortified, in his royal name he makes the petitioner "the grant that he asks for, as he describes it and as Christobal de Tapia formerly enjoyed, without prejudice to a third party who may have a better right," and he commands Captain Baltazar Romero to place petitioner in real possession, and when these proceedings shall have been had he *will transmit this grant and possession to the civil and military secretary, in order that he make a certified copy thereof.* (Tr., p. 221.)

These are all the grant papers. No document showing the putting in juridical possession and defining the boundaries is produced.

There was also filed in the Court of Private Land Claims another petition by J. Francisco Chavez, which stated that at some time in the early part of the eighteenth century a grant was made by the proper authorities of Spain to Joaquin Sedillo which lies immediately south of the lands of the Indian Pueblo of Isleta, and was bounded on the north by the line of the league of said pueblo, on the east by the Rio Grande, on the south by a twin alamo called by some the alamo de la culebra, and on the west by the ceja of the Rio Puerco; but the original grant papers evidencing the said grant have been lost or destroyed and cannot now be produced. The fact of the existence of the said grant is, however, shown by papers, which constitute a portion of archive 178, in the office of the surveyor general for New Mexico; that from the time of the making of said grant said Sedillo and his successors in title have been in peaceable possession of the land within said grant; that there are no persons claiming any part thereof adversely to the petitioner; that said land is situated in Valencia County, and the boundaries thereof are as hereinafter set forth; but it is expressly averred that the eastern boundary refers to the old river bed of the Rio Grande, which is about two miles further east than the present river bed; that it is impossible to state even approximately the quantity of land embraced in said grant, as *no survey thereof has ever been made*, but it is estimated to be between ten and fifteen thousand acres. The southern boundary has been completely destroyed and its location cannot be identified with certainty. No claim for said grant has been considered or acted upon

by Congress or the authoritities of the United States, or has been submitted to the authorities constituted by law for the adjustment of land titles within the limits of New Mexico. (Tr., pp. 217–219.)

No copies of grant papers are attached to this petition, so that there is really no relevant evidence of any such grant in this record.

The Court of Private Land Claims considered the two cases together, confirming both grants but defining the limits. (See its judgment, pages 221 to 227, inclusive.)

The confirmation is based upon the law of prescription and rather upon length of possession than upon the fact that the documents showed a complete title from the Spanish government. (See Tr., p. 222.) And it is decreed that the claim "for so much of said land as lies between the old and the present river beds of the Rio Grande del Norte, commonly known as the Bosque de los Pinos," is confirmed to Chavez, and that so much of the land as lies west of the present river bed of the Rio Grande del Norte is confirmed to the Pueblo of Isleta. The court then defines the boundaries of the lands claimed, as follows: "On the north by the southern line of the pueblo grant to the Pueblo of Isleta, as surveyed under the confirmation of the same by the Congress of the United States; on the east by the old river bed of the Rio Grande del Norte; on the south by the north line of the grant to Ana de Sandoval y Manzanares, as established by the decree of this court in the case of *J. Francisco Chavez and Solomon Luna* v. *United States*, No. 64 on the docket of this court; and on the west by the ceja (being the divide between the Rio Puerco and the Rio del Norte) of the Rio Puerco; and that the area of the said land is estimated to be between thirty and thirty-five thousand acres."

The railroad right of way crossing these two grants in a south-westerly direction crosses the north and south line as subsequently established. The length of the right of way over the two grants is about four miles. Prior to the filing of the petition in the Court of Private Land Claims, no one, including the owners of the grants, knew of their existence except that in the trial of the San Clemente case in the Court of Private Land Claims the government found and produced in that case the archives tending to show these two grants. Prior to the decision of the Court of Private Land Claims no one could have determined where the north and south line of said grants or either of them was located, or the width of them, or either of them north and south, except that the north line was the south line of the previously surveyed and patented Isleta Pueblo grant, and the south line was the north line of the San Clemente grant as subsequently confirmed by the Court of Private Land Claims. (Tr., p. 227.)

Prior to the decision of said court there never was any segregation of the land contained in these two grants from the lands of the United States, or from the lands of anyone else, except as may be claimed from the foregoing. (Tr., p. 227.)

Lands embraced within the foregoing grants were not segregated from the public domain until confirmation by decree of the Court of Private Land Claims. Until then Congress could have granted a right of way over said lands because such lands until segregated continued to be a part of the public domain. These Spanish grants were incomplete and imperfect and the descriptions were vague and indefinite.

Upon the acquisition by this government under the treaty with Mexico, of territory embracing New Mexico,

Arizona and California, this government succeeded to the sovereign rights of old Mexico over the lands. Where under the former governments the title to the grant was incomplete, inchoate or the description uncertain and indefinite, the land still remained in the control and disposing power of the government and as part of the domain of the government. Therefore, the Supreme Court of the territory had just previous to its decision in this case held that a mining claim might be located upon such grant. (See *Lockhart* v. *Wills et al.*, 54 Pac., 336.)

In *Apis et al* v. *United States*, 88 Fed., 931, it was held that a patent issued under an act of Congress granting to the Mission Indians a portion of the land embraced within a Mexican grant was valid, and withdrew the land so granted from the operation of a former act of Congress permitting the legal representatives of Apis, the original holder of the Mexican grant, to litigate in the United States District Court their claim to such lands.

In this case it was stated that Congress had power to dispose of land embraced within a Mexican claim under judicial consideration. (See pages 935, 936, 937.)

See

Delauriere v. *Emison*, 15 How., 535.

See, also, *Botiller* v. *Dominguez*, 130 U. S., 238, 255 and 256, wherein it was held that no title to land in California dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to, and confirmed by, the board provided for that purpose under the act of 1851, or, if rejected by that board, confirmed by the District or Supreme Court of the United States. In other words, this government obtained sovereignty over all the property acquired by treaty from Mexico, and, as such, the

proprietorship to or dominion over the land therein; and might disregard, if it chose, its obligation to respect the grants made by the former governments, and some law was necessary as well as some action to be taken to divest the title of this government in respect to any portion of the lands.

In view of the peculiar nature and character of these grants, Congressional action has been deemed necessary to convey and release the title to this government to the claimants of such grants. Until such action has been taken this government has assumed the power and right to dispose of any portion of said lands, regarding them as still a part of the public domain. Therefore, in the 8th section of chapter 103, approved July 22, 1854 (10 U. S. Stat. at Large, p. 308), the office of surveyor general of New Mexico, Kansas and Nebraska was established, and it was made his duty to ascertain "the origin, nature, character and *extent* of all claims to lands under the laws, usages and customs of Spain and Mexico." He was required to give notice, summon witnesses, etc., to ascertain the facts and to make a full report on all such claims as originated before the cession of the territory to the United States, denoting the various degrees of title with his decision as to the validity or invalidity of each of the same; also to make report of all pueblos, showing the *extent* and locality of each, etc., which report should be laid before Congress for such action thereon as might be deemed just and proper. It was then for Congress to confirm or disaffirm such grants. No steps were taken under this act to have these grants confirmed.

This act was finally superseded by the act approved March 3, 1891, creating the Court of Private Land Claims.

(Chap., 539, 26 U. S. Stat. at Large, 854.) Section 6 of that act authorizes claimants of imperfect or inchoate titles to institute a suit to have the same confirmed in accordance with the principles announced in section 7 of the act. It required the claimant in his petition, among other things, to state the name of any person in possession of any part of the land otherwise than by lease or permission of petitioner, and serve a copy of such petition on such adverse possessor. This was not done.

Section 8 authorizes the holder of a complete and perfect title to make application to have the validity thereof determined, and where such title should be confirmed and established, the confirmation should be for so much land as such perfect title shall be found to cover, "always excepting any part of such lands that shall have been disposed of by the Untied States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to the holder of any such claim or title." The confirmation should only have the effect to release all claim of title by the United States.

Section 10 provides for a survey upon confirmation.

Under section 13 no claim was to be allowed which interfered with or overthrew any just and unextinguished Indian title or right to any land or place. It was also provided that no decree should conclude or affect rights of persons as between each other. The decree should only operate against the United States as a release by the United States of its rights and title to the land confirmed; that no imperfect claim should be confirmed for more than eleven square leagues.

In section 14 it was provided that if it should appear that any part of the lands decreed to any claimant have

been sold or *granted* by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decrees, etc. This shows that this government asserted the right of disposition notwithstanding the existence of such claims.

The foregoing grants were both imperfect. The records in the archives of Mexico, if any, and such as they were, show no final segregation or passing of title to these lands. The decree or presentation papers signed by the governor in respect to the alleged Gutierrez grant was a mere preliminary order to the proper officer to put the petitioner in possession of such lands as should be vacant and unoccupied. It was necessary that juridical possession be given and a record of the officer fixing the boundaries or making a survey of the claim was essential.

In *United States* v. *Elder*, 177 U. S., 117, the following language is quoted with approval:

"Under the civil, as at the common law, a formal tradition or livery of seisin of the property was necessary. As preliminary to this proceeding the boundaries of the quantity granted had to be established, when there was any uncertainty in the description of the premises. Measurements and segregation in such cases, therefore, preceded the final delivery of possession."

In *Menard's Heirs* v. *Massey*, 8 How., 293 and 310, the manner in which a complete title under the Spanish government was executed is given. This showed as the final document the survey. On page 306 it is said:

"Petitions were written by the party asking the land, or some one for him; the governor consented usually by endorsement on the petition, and ordered that the petitioner should have the land and directed that it should be surveyed; the paper was handed to the petitioner, who might deliver it to the surveyor, or omit it; if he presented it, and the land was laid off, then it was the surveyor's duty to record both the concession and plat,

together with the *process-verbal*. But this did not make the party owner; without the further act of the King's deputy—the intendent-general—the title still continued in the crown."

Moreover, in the case of *Chavez* v. *United States*, 168 U. S., 177 and 188 (citing among other authorities the Royal Order of 1754), it was laid down that by the Spanish law in force long prior to 1788 lots and lands were distributed to those who were intending to settle, and it was provided that "when said settlers shall have lived and labored is said settlements during the space of four years, they are hereby empowered, from the expiration of said term, to sell the same, and freely to dispose of them at their will as their own property." But confirmation by the audiencia, or the governor, if recourse to the audiencia was impracticable, after the four years had elapsed, was required in completion of the legal title.

This is apparent in respect to the Gutierrez grant, inasmuch as he states in his petition that the lands were formerly held by Christobal de Tapia, who had evidently forfeited his rights, and the petitioner was seeking title in the same manner. But there is no record to show a subsequent confirmation of his title, or settlement for the requisite period.

Moreover, in *Bergere* v. *United States*, 168 U. S., 66, on a petition to the governor of New Mexico for a grant of public land, the governor directed possession to be given by the alcalde, and the expediente to be transmitted by that officer to the office of the governor, so that, if approved, the proper testimonio might be ordered to be given to the petitioner. It was held that no grant was made until return should be made by the alcalde, and until his action should be approved by the governor it was without effect.

In that case some reliance was placed to show a grant upon the long continued possession by the alleged grantee, which possession was attempted to be shown from pasturing of stock upon the land; but as it did not appear that such possession was *exclusive*—that no other parties pastured their stock upon the lands, from which it might appear that such possession was exclusive—the evidence was held insufficient to show a title by prescription.

But over the lands in question, owing to the peculiar nature of the grant, the government of Mexico would undoubtedly have had the power to grant a right of way. The petitioner asks for a grant of lands on which to plant and also for pasturage purposes, "to the end that his sheep may have room to scatter out," and the claim under this grant is made for some ten or fifteen thousand acres. It cannot be supposed that the government intended to grant in fee simple such a large amount of land to a single individual. The grant was asked mainly for the purpose of permitting grazing. The governor ostensibly grants the land "as Tapia formerly enjoyed it," "without prejudice to a third party." At most the usufruct was granted, but the government still retained the power and right to grant portions of the land for other purposes. The grant of a right of way thereover would not materially interfere with the enjoyment of the land for pasturage purposes.

Thus, in *Zia, Pueblo of* v. *United States*, 168 U. S., 198 and 206, it is shown that the concession of a great extent of land for rearing and pasture of cattle constitutes no more than the usufruct of it, for the time agreed upon, but the grantee has not, nor never had, the most remote right to solicit the proprietorship, for there was no law or regulation upon which to found it, and consequently the land does not go

out of the class of public lands, since it is the same as if it were held on rent.

A similar ruling was made by Surveyor General Julian in regard to another grant found in this record. (See Tr., pp. 243–246, inclusive.) He refers to White's collection of Civil Laws of Spain and France, Vol. 2, page 287, and Vol. 1, page 57.

In order, however, to segregate the land from the public domain the title must not only be perfect and complete but the description therein must be so definite and certain as to be readily ascertainable, leaving nothing to doubt or conjecture. The Court of Private Land Claims found it necessary to fix the north and south lines with respect to the lines of other grants as confirmed by it, and it was admitted that no survey of the lands had ever been made prior to the location of the railroad. A survey was necessary to effect a segregation from the public domain.

Stoneroad v. *Stoneroad*, 158 U. S., 240, 247, 248 and 251.

In *Carpentier* v. *Montgomery et al.*, 13 Wall., 480, it was held that where a Spanish or Mexican grant does not identify the precise tract of land granted, the title is an imperfect one, needing the further action of the United States government to make it perfect. That such is the case where one side of the tract is undefined, or one of the exterior boundary lines cannot be located. An authoritative survey is required to demonstrate the particular tract granted. It was also held that the confirmation of such a grant segregates the land from the public domain only when surveyed.

See, also,

Scull v. *U. S.*, 98 U. S., 410, 419.
Pinkerton v. *Ledoux*, 129 U. S., 346.

In *Dauterive* v. *United States*, 101 U. S., 705, it is said:

"Under our treaty of cession the United States acquired in sovereignty all the lands in the province which had not before been granted by one or the other of the two prior sovereigns and severed as private property from the royal domain. * * * That the title must be complete under the former sovereign, that is, the land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgments can be rendered with precision by such metes and bounds, natural or otherwise; that nothing must be left to doubt or discretion in its location; and if there was no actual survey previously made which a surveyor can follow, there must be such a description of natural objects for boundaries that he can do the same thing *de novo*, or, in other words, the separation of the tract from the public domain must not be a mere conjectural separation, but complete without any element of discretion or uncertainty. *Scull* v. *United States*, 98 U. S., 410, 418; *Smith* v. *United States*, 10 Pet., 326, 334."

See, also,

Doe v. *Higgins*, 39 Ala., 19.
LeDoux v. *Black*, 18 How., 473.
United States v. *King*, 3 How., 773, and
Muse v. *Arlington Hotel Co.*, 68 Fed., 644.

The description in the petition for a grant is of the most vague and general kind. There is no document showing a description of the land in which the petitioner was put in possession, neither were the lands actually enclosed.

In *McGuire* v. *Tyler*, 8 Wall., 651, on page 660 it is said:

"Where the documentary evidences of title produced by the claimant contain no sufficient lines or boundaries to show that any definite and distinct parcel of land was severed from the public domain, the universal rule as settled by repeated decisions of this court is that the concession in such a case creates no right of private property in any particular tract of land which can be maintained in a court of justice without an antecedent survey and location."

The right of way being located under a grant of Congress, the title thereto must prevail over an alleged incomplete Spanish grant though subsequently confirmed.

In *Trenier* v. *Stewart*, 101 U. S., on pages 801 and 802, Mr. Justice Clifford said:

"Concessions of the kind having never received the sanction of the supreme power of the province, they did not have the effect to segregate the tract conceded from the mass of the public lands, from which it followed that when the jurisdiction of the province was transferred by the treaty the legal title to all such tracts vested in the new sovereign until confirmed."

In *McCabe* v. *Worthington*, 16 How., 86, it was held that a decree, confirming an inchoate Spanish title, made by this court on appeal in 1836, upon a petition originally filed in 1824, did not relate back so as to divest a title gained from the United States under an entry of public lands made in 1834.

The title takes effect only from the date of confirmation and survey. (See *Dent* v. *Emmeger*, 14 Wall., 308 and 313.)

In *Menard's Heirs* v. *Massey*, 8 How., 293, it was held that an incomplete Spanish title, confirmed by Congress in 1836, cannot prevail against a patent for the same land issued before the act of confirmation.

It was also held in that case that the provision contained in the tenth section of the act of March 3, 1811, reserving from sale tracts of land, the claim to which has been presented to the recorder, etc., does not apply to an unreserved claim, the boundaries of which are not ascertainable from the calls in the concession.

In *Willott* v. *Sanford*, 19 How., 79, there were confirmations of conflicting Spanish grants by Congress, and it was

held that the prior confimation and survey must prevail—also, that there must be such a definite description as will identify the land with certainty and segregate it from the public domain.

Therefore when the description is indefinite or uncertain, although the grant may be confirmed by Congress, the land is not segregated from the public domain until a survey be made and approved. (See *LeDoux* v. *Black*, 18 How., 473 and 475; *LeCompte* v. *United States*, 11 How., 115, 125, 127; *Dent* v. *Emmeger*, 14 Wall., 313.)

Four miles of right of way over these two grants was exempt from taxation.

San Clemente Grant.

Upon crossing the foregoing grants the right of way is over a portion of an alleged Spanish grant, known as the San Clemente grant, for a distance of ten and five-tenths miles. (Tr., p. 227.)

The right of way crosses the north, south and west lines of said grant. A copy of said grant was filed in the office of the surveyor general of New Mexico, May 30, 1855, and is as follows (Tr., pp. 228, 229):

Petition of Ana de Sandoval y Manzanares, to the governor and captain general, reciting that when the former governor brought them hither for settlement he promised to give to each one of the native citizens of the province who might come to settle and pacify the same the tracts of lands and fields and stock-raising ranches that they abandoned in the year '80 on account of the powerful insurrection. That by virtue of having been restored to said province, suffering thereby a great many hardships and finding herself really poor and a widow of Blas de la

Candalaria, deceased, and burdened with children, a good reason to supplicate that he grant her in the name of His Majesty "a tract of land called San Clemente, which I inherited from my father, deceased, Mateo de Sandoval y Manzanares, who left me the grant of said rancho, with its boundaries as follows: On the northern part with the lands of Christobal de Tapia, and on the southern part with the lands and walls of the house of Tomo Domingues; on the eastern part with the Del Norte river; on the part of the west with the Rio Puerco," and she asks that she may be placed in royal possession of said tract, together with the new grant.

This is followed by the presentation and decree signed by Phelix Martines, reciting that in the City of Santa Fe, on the 13th day of July, 1716, the petition was presented by the petitioner; that he treated the same as in due legal form, and in view of the justness of the petition, said lands belonging to her father, according to her petition, and the same having been abandoned by him on account of the insurrection in the year '80, he concedes to her "the grant she asks" to the aforesaid, "her children, heirs and successors, that she may enjoy and hold the same; *provided that it be without injury to any third party, who may have a better right*; and she must settle the said grant within six months on account of the many occupations of the time." Then he commands Captain Antonio Gutierrez to place her in royal possession, and that this decree shall be for her a sufficient title; and as soon as said possession is given her, this original may be returned to this office and a duplicate may be made.

This is followed by a document signed by Antonio Gutierrez, reciting that on the 23rd day of July, 1716, he, as alcalde, in compliance with the above decree, went to the

tract and lands in said decree and gave royal possession to Felix de la Candelaria, in the name of his mother, Ana de Manzanares y Sandoval, in legal form, with the accustomed ceremonies, etc., and describes the following boundaries: "On the east by the Rio del Norte, on the west by the Rio Puerco, on the south by the house of Tome Dominguez, and on the north by a ruin that is a little above the Pueblo of San Clemente; and in the said boundaries I ordered mounds to be made, having first examined them, and I signed it with two attending witnesses," etc. (Tr., p. 228.)

On November 18, 1871, the surveyor general of the Territory of New Mexico approved said claim, and on December 18, 1872 (after location of the right of way), transmitted the same, with his approval, to the commissioner of the general land office. In 1873 the report of the surveyor general was transmitted to Congress by the secretary of the interior, and in April and May, 1878, a preliminary survey was made under the direction of the surveyor general. On November 5, 1886, the then surveyor general of the Territory of New Mexico decided that while the Spanish grant papers were genuine, yet the claim should be rejected for other reasons, and so reported to the commissioner of the general land office, and his report was transmitted to Congress. No action was ever taken by Congress. Afterwards the claimants of said grant presented a petition to the Court of Private Land Claims at Santa Fe, New Mexico, to have the grant confirmed against the United States, and on September 4, 1896, a decree was entered by said court confirming said grant. (Tr., pp. 230, 231.)

The decree of confirmation is found on transcript pp. 230, 231. In the decree the court fixes and settles the boundaries of the tract confirmed. The estimated area is about 37,000 acres. (Tr., pp. 230-231.)

Prior to the survey made under this decision of the Court of Private Land Claims in said cause, no one could have determined, actually, where the line of railroad entered into or passed out of this grant, or how much mileage there was over lands belonging to this grant. While some portions of this grant were occupied by the owners of interests in it, yet none of the portions covered by the right of way of the railway company were occupied, or cultivated, and the owners claimed the north line to embrace lands contained in the two grants heretofore stated, and the survey of 1878 was in accordance with that claim. At the time of the location of the right of way of the railway company over the lands contained in this grant the walls of the house of Tome Dominguez were not in existence and the line between said grant and the lands that were owned by Cristobal de Tapia prior to 1716 was undetermined, with nothing to mark its existence on the grant or elsewhere. (Tr., p. 282.)

Prior to the decision of the Court of Private Land Claims in this case, it would not have been possible for anyone to have actually determined how many miles of the right of way of said railroad was located on lands covered by said grant, or where said right of way crossed the exterior lines of said grant. (Tr., p. 232.)

At the date of the passage of the Atlantic and Pacific Railroad act, and, indeed, at the date of the location of the right of way, the land covered by this grant was not segregated from the public domain and therefore remained a part thereof.

The title was incomplete because there was no subsequent confirmation and no record to show that the petitioner had remained in possession the requisite length of time as required by the decision in the case of *Chavez* v.

United States, 168 U. S., 177, 188. It is apparent that something of this sort was necessary from the papers in this case, inasmuch as petitioner asks for a new grant of lands which had been formerly occupied by her father, but abandoned by him on account of the insurrection.

The description, however, was too indefinite and uncertain to segregate the lands from the public domain. This segregation was effected by the act and documentary evidence made by the alcalde after putting the petitioner in possession. The preliminary decree is of no defined tract, but, on the contrary, "is without prejudice to the rights of other parties." It directs the alcalde to ascertain whether any third party be in possession of any portion of the lands, and to give possession to only that part which is unoccupied. It also requires possession to be taken within six months. It was the duty of the alcalde, therefore, to fix the boundaries, and, by his record, to definitely segregate the lands from the public domain. Such segregation, within the decisions heretofore cited, was not accomplished by fixing as the northern boundary of a tract of land consisting of over thirty-five thousand acres "a ruin that is a little above the Pueblo of San Clemente," and the southern boundary as "the house of Tome Dominguez." It is essentially lacking in enclosing lines or boundaries. A ruin or a house may furnish a starting point or a corner; but it cannot be a definite boundary or enclosing line to such a large tract. (*Carpentier* v. *Montgomery*, 13 Wall., 480, and cases heretofore cited.)

Ten and five-tenths miles of right of way through this grant, as subsequently confirmed and surveyed, was therefore exempt from taxation.

NICHOLAS DURAN DE CHAVES GRANT.

The right of way crosses from the San Clemente grant aforesaid into another alleged Spanish grant known as the Nicholas Duran de Chaves grant, crossing the north line of said grant as recently established, and re-crossing again into the San Clemente grant, being two and one-fourth miles within the Nicholas Duran de Chaves grant, as finally confirmed and established. (Tr., p. 232.)

On April 11, 1877, long after the location of the right of way, a petition was presented to the surveyor general of New Mexico on behalf of the alleged legal representatives of Nicholas Duran de Chaves. (See Tr., pp. 232–235.) It set forth that in 1739 Nicholas de Chaves, known also as Nicholas Duran de Chaves, petitioned Governor Mendoza of New Mexico for a tract of unoccupied and uncultivated land; that such petition was approved and the alcalde directed to put Chaves in possession, with designation of the boundaries, which was done, and that on October 6, 1743, Mendoza reaffirmed the grant with boundaries as originally made; that in 1749 the lieutenant governor of New Mexico in a controversy fixed the boundaries between said lands and the community of Belen; that the amount of land claimed is not known, as no survey has ever been made of the grant; that most of the lands embraced within the limits of said grant have been surveyed by the government of the United States, and they appear as public lands open to settlement on the official plats of the survey of said lands. Claimants requested that action be taken as required by the act of 1854, to withdraw such lands until final action be taken by Congress. It then sets out sections and parts of sections surveyed as public lands.

With said petition the following grant papers were presented to the surveyor general:

Petition of Don Nicholas Duran de Chaves, to the governor, stating that in the preceding year, 1738, the preceding governor, having passed through Albuquerque, he petitioned for an uncultivated and unoccupied tract on the banks of the Del Norte river, "as I have some large and small stock without having a reasonable place to keep them except with injury to my neighbors and the Pueblo of Isleta"; that he was ordered to remain on the tract until the succeeding governor should arrive, and he therefore asks such governor for a grant of said tract bordering on the Del Norte river, the boundaries of which, on the east side, look upon said river, upon that of the west the Rio Puerco river, upon that of the north the lands of Captain Bernabe Baca, and upon that of the south it fronts upon the ponds which are called San Pablo's; that he entered upon it at the risk of his life and *fitted up a hut and put his stock upon it*, and has maintained himself there ever since, and he asks that the alcalde shall put him in possession under the formalities prescribed by law.

This is followed by a document signed by Governor Mendoza, reciting that at the Town of Santa Fe, June 1, 1739, said governor having examined the petition and treated it as presented, and in view of what is contained in said writing set forth, makes to him the grant in the name of his majesty, of the tract of land which he asks for, for him, his children, heirs and successors, who may have the better right, in virtue of representing that it is without injury to a third party, with the conditions and provisions that he is to keep them as his majesty commands in his royal orders; and in virtue of said grant the chief alcalde

of Albuquerque shall place said Chaves in possession, "designating to him their boundaries."

This is followed by a document signed by the Alcalde Juan Gonzales Bas. It recites that at the place of the San Pablo ponds, on the 26th of August, 1739, said alcalde, "in virtue of the *decree* enacted" by Governor Mendoza, which decree was made known by him to the residents and adjoining owners to said lands, concerning which finding only slight controversy on account of it not being known by him or those persent which was the house of Tome Dominguez, which boundary said Nicholas Chaves mentioned in that which he asks for, and not being certain which was the house or walls which said Chaves asked for as a line or boundary, and Captain Bernabe Baca alleging and saying that possession was given to him at a house and walls which is that which he has for boundaries of the lands that he possesses, and each one alleging that he has the right of property to said boundaries, one because possession was given him therein, and the other asking as far as said house as a boundary, and there being a controversy between the two on account of there being two houses without any title whatever, within the distance of a league, and each one above and below wishing to appropriate it as his own, said alcalde, on account of the doubt and not being certain which of the two houses really is the one that belonged to Tome Dominguez, and by agreement of the two contestants, it was decided to give the possession by the lands joining each other at a point half way between the two houses; wherefore, a little round pond with some water and grown up with rushes was designated to him as a boundary and division of tracts. This serves as a boundary to said Bernabe Baca on the south side, and to said Nicholas

de Chaves it serves as a boundary on the north side; and not finding any other controversy, he proceeded to give the possession; and having travelled about four leagues, arrived at the boundary of the said place of the San Pablo ponds, where in the presence of attending and instrumental witnesses, as required by law, he gave his hand to said Chaves and conveyed over to him his lands, etc., fixing the boundaries as follows: "On the east side of the Del Norte river; on that of the south the San Pablo ponds; on the west with the Puerco river; and on the north by the one I have referred to as between the two houses, which is the little pond grown up with rushes on which I ordered mounds to be placed to perpetuate their memory, and it was given *free and general*, with pastures, watering places, woods and uses and customs," etc., part of the document being obliterated.

Upon this is a marginal note as follows:

"Santa Fe, September 30, 1739.

"This royal title is noted in the government book which is kept in the archive of this capital in order that it may appear of record when needed.

MENDOZA."

Also:

"Santa Fe, October 6, 1743.

"In this grant the boundaries are to be recognized as those therein mentioned, and they are the same which should be recognized by said grant, and its owner, who is Don Nicholas de Chaves, *it being understood that in this, as well as the other grants, the pastures, entrances and exits and water holes are common*, with the exception of cultivated lands, corrals and the rest that may be to the grave injury of the owner, and I signed it in order that it be observed.

GASPAR DOMINGO DE MENDOZA."

(Tr., p. 237.)

This is followed by a document, considerably mutilated, of the lieutenant governor, fixing the boundary between the

grant of said Chaves and the community of Belen. Then follow some documents relating to a controversy between said Chaves and Baca. (Tr., pp. 237–238.)

On December 16, 1887, Surveyor General Julian recommended confirmation of the grant only as to the cultivated lands, which was to be ascertained and surveyed, but not as to lands held for pasturage purposes. His opinion is found on transcript pages 243 to 247.

He finds that there is no record of the grant among the archives of New Mexico; that on the contrary the grant and act of possession with other papers pertaining to the claim were kept in the private custody of the grantee and his heirs until they were filed in the office of the surveyor general of New Mexico, on April 11, 1887. (Tr., p. 245.)

He finds, however, that in the paper signed by Governor Mendoza October 26, 1743, and according to the law then in force, that the grant was only effective as to the cultivated lands, but as to the pastures, entrances, exits and waters, the grant was a mere usufruct to be enjoyed in common. The estimated area was 50,000 acres. (Tr., p. 245.)

He finds that the governor had no power to grant the fee of pasture lands inclosed in the boundaries specified in the grant, which must be held void except as to the lands actually cultivated and occupied; that the particular boundaries and actual area of the cultivated lands were not shown with any definiteness by the testimony, and he therefore recommended the confirmation of the grant to the extent of said cultivated lands only, the area and boundaries of which could only be ascertained and actually determined by a survey. (Tr., p. 245.)

It was admitted, as stated in the foregoing opinion of the

surveyor general, that the grant papers showing the original grant were never in the public archives of the surveyor general's office of New Mexico, or filed in any other public office, or placed in any other public record in the Territory of New Mexico, but were retained in the private possession of the persons claiming to own the same until filed with said petition in the surveyor general's office April 11, 1887; but there were in the Spanish archives in the office of the surveyor general a number of other papers tending to show the existence of the grant.

The surveyor general reported said claim to the commissioner of the general land office, and on June 9, 1890, said surveyor general transmitted to the commissioner of the general land office a letter stating that there should be reserved from entry, by reason of the Nicholas Duran de Chaves grant, No. 155, all of the surveyed lands in township No. 5 N., R. 2 E., in New Mexico, comprising section 6 and fractional sections 4, 5, 7 and 8; also the surveyed lands of township No. 6 N., R. 2 E., New Mexico, comprising sections 30 and 31, and fractional sections 19, 20, 21, 28, 29 and 32; that the aforesaid comprised substantially the cultivated and occupied lands pertaining to said grant. (Tr., p. 245.)

This is followed by letter of the commissioner of the general land office acknowledging receipt, and suggesting:

"As this claim has been reported upon favorably by your office under the 8th section of the act of Congress approved July 22, 1854, the lands contained within the limits as approved should be reported to the register and receiver of the district in which the land is situated, with any necessary information, as that they may withdraw from entry all of the land contained therein."

On August 23, 1893, said grant having been presented to the United States Court of Private Land Claims, it ren-

dered a judgment. (Tr., pp. 247–250, inclusive.) It confirms a portion of the grant and fixes the boundaries, the estimated acreage being about 50,000 acres. Subsequently a survey was made under the decree of the Court of Private Land Claims, and this survey was confirmed in May, 1895, by said court. (Tr., p. 252.)

Prior to this survey and confirmation, it would not have been possible for any person to have ascertained or determined where the right of way entered and left the lands covered by said Spanish grant. The location of the northern boundary line, which is crossed by the right of way, both in going into the grant and in coming out, was always a matter of dispute between the parties claiming this grant, and the parties owning the grant lying to the north. (Tr., p. 252.)

The point where the right of way crosses the northern line of this grant going west is about twelve miles distant from the Rio Grande Valley, where the settlements upon this grant were, and that portion of the lands of the grant covered by the right of way was and is, and always has been, a sandy desert tract of high tableland, uninhabited and unoccupied. (Tr., p. 252.)

From the foregoing, and particularly from the confirmation of Governor Mendoza in 1743, it is apparent that this alleged Spanish grant was simply to a great extent a grant of the usufruct or rather a permission or license for grazing purposes, not to the exclusion, however, of others, but a right to be exercised in common. It can hardly be supposed that the government intended to grant for the exclusive use of a single individual a tract of land embracing over fifty thousand acres. This was the opinion of Surveyor General Julian. (Tr., pp.

243–247.) See, also, *Zia, Pueblo of,* v. *U. S.*, 168 U. S., 198 and 206.

The railroad was not located over the cultivated part of this grant, but at quite a distance therefrom. It was over that portion used merely for grazing purposes and to which the owners of the alleged grant had not an exclusive right or title. The former government would have had the power and the right to have granted a right of way over such lands.

Moreover, the description in the document signed by the alcalde, which was the important document in which were to be fixed the boundaries segregating the grant from other grants and from the public domain, is so uncertain and indefinite that it would be impossible to determine the actual boundaries. The southern boundary, which is fixed as the "San Pablo ponds," and the northern boundary as "a little pond grown up with rushes" between two houses, affords no boundaries or enclosing lines. The northern boundary is simply designated as a point and not a line. The description is essentially lacking in corners or enclosing lines.

Under the decisions heretofore referred to in discussing the first grant, this description did not have the effect of segregating the alleged grant from the public domain.

Two and one-fourth miles within this grant were therefore exempt from taxation.

ANTONIO SEDILLO OR CANADA DE LOS APACHES GRANT.

The right of way going west on crossing the west line of the San Clemente grant crosses a small piece of public land and then crosses in a northwesterly direction the south and west lines of an alleged Spanish grant as subsequently

confirmed and known as the Antonio Sedillo or Canada de los Apaches grant. The right of way within the exterior limits of this grant, as subsequently confirmed, is thirteen miles.

A petition was filed in the office of the surveyor general of New Mexico, April 6, 1871. On November 6, 1871, the surveyor general reported to the interior department approving the grant. In April, 1872, the report of the surveyor general was transmitted to Congress, and on October 11, 1886, a supplemental report was made by the then surveyor general, recommending the rejection of the claim. On November 24th of that year this report was transmitted by the surveyor general to the commissioner of the general land office. In September, 1877, a preliminary survey was made under the direction of the surveyer general, which shows the grant, except as to the north boundary, just as subsequently confirmed by the land court. On December 6, 1887, the supplemental report of the surveyor general recommending the rejection of the claim was transmitted to Congress. (Tr., pp. 252, 253.)

The grant papers are as follows:

A petition in 1769 of Antonio Sedillo to the governor, stating that during a former governorship he and his neighbors presented a petition asking a grant of lands called "Los Quelties," which was granted and given to them and which they inhabited for four years, and that it was then three years since the same was abandoned on account of the great risk on the frontier. He therefore applied to the governor to concede to him a tract of land which at the end of the aforementioned grant he had registered, and which was called La Canada de los Apaches. "Its boundaries on the east is a hill called Serro Colorado,

which is the boundary of those of Atrisco; on the west the point of a tableland, which runs in said direction, and which comes out of the said Canada; on the north the grant of the settlers of Rio Puerco; on the south the boundary of Mateo Pino; * * * and *if at any time the said place should become settled, I shall put no obstacle to their enjoying it*, if they do not prejudice me in the possession of my part, * * * which I claim on account of having no land of my own where to maintain my large family," etc.

This is followed by a document signed by Governor Pedro Fermin de Mendinueta (see Tr., p. 254), which states that at Santa Fe on April 20, 1769, the above petition was presented by petitioner, and in consideration of his services and other reasons set forth, the said governor concedes as a grant to Antonio Sedillo the tract of land he asks for, with the boundaries he mentions, "and under the conditions in his petition contained, and also that he settle the tract in the terms and forms prescribed by the royal laws; and further that he do not sell the same to any ecclesiastical party, and without prejudice to any third party having a better right." He then directs Carlos Mirabal to proceed, after summoning adjoining settlers, and if no contradiction is raised by a legitimate party, to put said Sedillo in possession, making a duplicate of the whole and deliver to said Sedillo, that it may serve him as a title, *and return the originals, that they may be filed where they belong.* (Tr., p. 254.)

This is followed by a document signed by Carlos Mirabal, reciting that on April 25, 1769, said Sedillo appeared with grant of lands given by said governor, and said Mirabal proceeded to the tract mentioned, accompanied by two witnesses, to give royal possession, summoning the adjoining settlers of Atrisco, as well as those of Rio Puerco,

who saw the petition and decree, and that he gave possession of the lands as follows: "With its boundaries on the east the Puerco river, on the west the point of tableland which runs in the said direction and which comes out of said Canada de los Apaches, on the north the grant of the Rio Puerco, on the south the boundary of Mateo Pino." (Tr., marg. p. 432.)

On June 13, 1892, claimants of this grant filed their petition in the the Court of Private Land Claims. (Tr., p. 255.)

In this petition it is shown that according to the survey made by the surveyor general in 1877, the alleged grant contained eighty-eight thousand and seventy-nine and seventy-eight hundredths acres, and this survey is claimed to be incorrect, because the *mesa* which comes out of the Canada de los Apaches, and which is the western boundary, is left entirely outside of the grant by the surveyor. It also states that there is no one in possession claiming adversely, with the exception of the Atlantic and Pacific Railroad Company, which claims a portion of the land north of said survey and west of the surveyed claims of said Rio Puerco grant, and petitioner expresses a willingness that so much of said lands as is claimed by said railroad company, the same being the alternate odd numbered sections of said survey, may be excepted from the confirmation prayed for.

On December 17, 1892, the grant was confirmed by the Court of Private Land Claims. (Tr., p. 257.)

The confirmation is based upon the provisions of the royal order of the King of Spain of October 15, 1754. It fixes the boundaries and specifies the area at eighty-eight thousand and seventy-nine and seventy-eight hundredths

acres, according to the survey made in 1877. It is also provided in the judgment that the station grounds and right of way, two hundred feet in width, of the Atlantic and Pacific Railroad Company through said alleged grant, be excepted from the operation of the confimation. The survey of said grant made under said decision has not yet been approved. (Tr., p. 258.)

Where the right of way crosses this grant at the time of its location and ever since the lands were unenclosed, uncultivated and unoccupied, consisting entirely of high desert lands, with nothing to distinguish the lands of the grant from public lands of the United States. Except, as aforesaid, there has been no segregation of this grant from the public domain. (Tr., p. 259.)

That prior to the determination by the Court of Private Land Claims it would not have been possible to locate the exterior lines of said grant, except as the preliminary survey may have shown them. (Tr., p. 259.)

Neither the Atlantic and Pacific Railroad Company nor its receivers or assigns have acquired by purchase or condemnation any portion of the right of way over the lands contained in said grant. When the claim for this grant was pending before the Court of Private Land Claims, the Atlantic and Pacific Railroad Company was a party to it, and in its answer claimed, among other things, the ownership of this right of way by virtue of section 2 of the act of Congress approved July 27, 1866. (Tr., p. 259.)

Under the decree entered in this case, to which the United States was a party, as well as the grant owner, although made by consent, it is clear, as adjudicated in that case, that the title of the Atlantic and Pacific Rail-

road Company to its right of way through this grant was obtained under section 2 of the Atlantic and Pacific Railroad Act of Congress, and is superior to the Spanish grant. It is an adjudication as between all the parties interested.

The title was moreover imperfect and incomplete within the ruling of this court in *Chaves* v. *United States*, 168 U. S., 177 and 188, and Mirabal, who put the alleged grantee in possession does not appear to have been an officer having authority to do so.

Again, it is no doubt true that this alleged grant of over eighty-eight thousand acres to one individual was not intended to convey the fee simple title, but was a grant, as in many other cases, of a right to pasture and for the roaming of cattle, a right to be exercised in common with others; in which case the government retained the power of disposition for other purposes, and concerning which the grant of a right of way would not be inconsistent or detrimental thereto.

Again, the lands, owing to the indefiniteness of the description in the alleged grant, were never segregated from the public domain until surveyed by this government in 1877. Until that date such lands must be regarded as still being considered as a part of the public domain so far as section 2 of the Atlantic and Pacific act was concerned.

Thirteen miles of the right of way through this alleged grant were, therefore, exempt from taxation.

LAGUNA INDIAN PUEBLO TRACTS.

Upon leaving the west line of the foregoing grant the right of way of the railroad crosses the public domain for a distance of about eight miles and then enters the lands known as the Laguna Indian Pueblo Tracts, crossing a portion of these tracts in a northwesterly course, and after passing through the Pueblo of Laguna and across public lands it again crosses another of these tracts. The entire distance of the right of way crossing these tracts is about seven miles. The tracts in question were not claimed as a Pueblo grant, but under purchase from private individuals. They are known as the Palmate Rancho, adjoining Cebolleta, El Rito Rancho, Gigante Canon, San Juan Rancho and Santa Ana Rancho.

Prior to 1859 a claim for these tracts was presented to the surveyor general of New Mexico, and transmitted with his approval to the commissioner of the general land office, and by such commissioner to Congress. The claim was confirmed by act of Congress June 21, 1860, but the first survey made thereunder was made in 1877, which survey was approved in June, 1877, and on September 22, 1884, a patent was issued.

The character of the country covered by this grant is the same as that covered by the other grants, except that at the time of the location of the right of way there were small tracts cultivated by the Indians in this grant, but no inclosed land. The right of way passed through some of these small cultivated tracts, but the exterior boundaries were never determined or segregated until the survey made in 1877. (Tr., p. 259.)

The grant as presented to Congress did not show any

original grant from the governor of the territory or anyone having authority.

Grant No. 1 appears from documents in substance as follows:

A certificate of Manuel Aragon, chief justice and war captain of the Pueblos of Acoma, Laguna, etc., stating that in view of his resignation he was requested to leave a statement of the government and orders given by the governors of the province, to see if by this means the pueblo could be relieved from the disorders and grievances suffered in the changes of justices and ministers; that in compliance with this demand, he executed this declaratory statement, stating that being present at the general visit made to this pueblo by Governors Chacon, Alencaster, Maynes and Manriques, authorizing these Indians to extend their fields beyond the league granted to them by the king as far as they could plant, for the actual support and maintenance of their families. The pueblo being situated in such a locality as not to afford them a sufficient quantity of arable land within the league allowed them by the king, and this pueblo having formerly suffered this scarcity of land for cultivation when this province was governed by Cachupin, these Indians purchased the rancho called Pagnati, situated to the north and adjoining the site of Ceballeta, distant three leagues from this pueblo. This rancho was formerly granted to Pasqual Pagarito, Vicente Pagarito, Antonio Pagnati and Miguel Magnino, and having possessed it for thirty years they sold it to the pueblo; and certain citizens having petitioned and asked for permission to settle there they have not been allowed to do so by the superior government, as it was a purchase made by the Indians, who held a deed authorized by the former justice of the peace of this pueblo; that in regard to the land towards the east,

they have been allowed to plant on the rancho known as El Rito, and therefore also the Gigante Canon to the ajo del Chamiso, together with the rancho commonly called San Juan, for pasture lands for their animals, the frontier being so much exposed that they cannot risk them in any other direction. On the west they have the site known as Cubero, where they have fields under cultivation and an acequia of their own, and they irrigate with the same water that passes through this pueblo; and in the same westerly direction, distant a mile from said pueblo, in the rancho called Santa Ana, where they hold lands for cultivation *in common;* as far as the alcalde is concerned who is to reside in this pueblo, he is forbidden by superior orders from availing himself of the labor of the Indians, etc.

This document is dated March 25, 1813, and is endorsed:

"Santa Fe, August 28, 1826.

Approved so far as this government is concerned, and legal and formal in its contents.

NARABONA."

Marginal notes:

"This document is to remain in the hands of Don Juan Miguel Casique, and at his death in those of his two daughters, Catrina and Josefa, who have the same right and interest in the site, together with Don Vicente Romero, included in the same interest.

(RUBRIC.)"

"The site of Cubero, mentioned in this document, and the water running through it, is the only water these Indians have the use of, as this proceeds from the Gallo Spring; therefore if the said spring is settled these poor Indians would perish, as it is the same water that reaches to the pueblo, and these Indians are entitled to it, being old settlers in good faith for more than one hundred years.

(RUBRIC.)"

Grant No. 2 appears from documents as follows:

A document signed by one Ensebio Aragon, whose only

title appears to be that of protector of the Indians, stating that in the year 1820 Vergara, protector general of the Indians of the province of New Mexico, executed a document alike to the instrument authorized by Don Antonio Sedillo in the year 1769; and for not stating three boundaries which said protector did not mention in his document, the parties mentioned in said document requested him to make a copy thereof, stating the boundaries to which the rancho of Pagnati is entitled, which document is of the following tenor:

For this pueblo of Jemes, on the first day of June, 1820, a document authorized by the former alcalde of the pueblo of Laguna was presented to him by Lorenzo and Alonzo Santiago, Alonzo the second, Torribio and Rita, native Indians of said pueblo, requesting him to take charge of the interests they represented in the rancho called Pagnasti, and having registered it, he finds that Sedillo, the said alcalde at that time, took cognizance of a suit brought by Juan Pagnasti and Pascual Pagarito, both residents of said pueblo, and it was ordered that each one should quietly remain upon his own property, without disturbing each other; that as protector of the Indians for the royal audience of Guadalajara, to whom alone it was proper for the Indians to refer matters of a common or private nature if they were in any way aggrieved, or if they had not a sufficient amount of land with that the law allows them, or that they may have legally acquired, and by virtue of the ancient possession of said land to which the said natives refer, called the rancho of Pagnasti, acquired by a legal title, and that the new settlement of Ceballeta, granted by Governor Don Fernando Chacon to certain citizens, and possession given by the Alcalde Don Jose Manuel Aragon, with the formalities required by the laws of possession and settle-

ment, the boundaries having been marked out. The aforesaid rancho and its boundaries in the direction of Ceballeta remained free with its ancient appurtenances, as far as the tableland of El Cabilan, on the south to La Cuesta, on the west to the Rito de San Jose, and on the east to the Canoncito del Cajo, etc., etc.

And it is said that there is no doubt in presenting themselves in person or through their protector to the Superior Audience they will be allowed to remain in peace, in the enjoyment of what is unquestionably theirs.

This document has the endorsement of the approval of Narabona, so far as the government is concerned, and according to the merit and formality in which it appears.

Then follows a certificate of Juan Garcia, a justice of of the peace, dated August 23, 1843, containing a statement of a sale made by one Baca for his father-in-law to the repsesentatives of the Pueblo of Laguna of all the arable lands in the rancho of El Rito. (Tr. pp. 263-264.)

Then follows a document containing the testimony of Jose Gonzales, before the surveyor general, to the effect that the Laguna Indians were in possession of the rancho Palmate since 1833, of the rancho El Rito since 1842; that the *Gigante Canon is used for pasture purposes in common by the people of Laguna and Ceballeta;* that they were in possession of the rancho San Juan since 1833, and of the rancho of Santa Ana since 1842, which *last appears also to be occupied by the Acoma Indians.* (Tr., pp. 265 and 261.)

Aragon swears that the *Gigante Canon is used by the whole neighborhood for pasture ground,* and he testifies to the possession by these Indians of the other ranchos since 1820. (Tr., p. 266.)

The surveyor general found that one of these tracts was acquired by the Indians by grant and purchase, and for the others they claimed a possessory title. (Tr., pp. 267–268.)

No title from the former governments was shown as to any of thse tracts, nor any record to show a grant, within the ruling of *United States* v. *Elder*, 177 U. S., 104.

They still remained therefore a part of the public domain of this government until segregated therefrom by the survey which it was necessary to make under the act of Congress confirming the title of the Indians. (*Stoneroad* v. *Stoneroad*, 158 U. S., 240; *Dent* v. *Emmeger*, 14 Wall., 313 and 314, and cases heretofore cited.) But long prior to the date of this survey the right of way had been located over these tracts and the title thereto had passed to the railroad company under the grant contained in the Atlantic and Pacific act.

This title was superior to that of the Indians as confirmed by Congress, inasmuch as the confirmation did not become effective to pass title until a survey thereunder had been made.

See

Le Doux v. *Black*, 18 How., 473 and 475.
Le Compte v. *United States*, 11 How., 115, 125 and 127.
Dent v. *Emmeger*, 14 Wall., 313.

Seven miles of the right of way over these tracts was therefore exempt from taxation.

LAGUNA PUEBLO.

After passing a portion of the grant last referred to, the right of way crosses for two Spanish leagues a grant subsequently confirmed by the Court of Private Land Claims, known as the Laguna Pueblo. It crosses this grant from east to west for a distanec of six and one-half miles. When the right of way was located and from that time since it passed around a hill on which the village of the Pueblo was and has since been located. (Tr., p. 268.)

The history of this grant is as follows:

On June 29, 1857, the Pueblo filed a petition in the office of the surveyor general of New Mexico, claiming a grant under a certain document alleged to have been executed by the governor general of the province in 1689. On November 22, 1872, after the location of the railroad right of way, the surveyor general gave a decision recommending confirmation of the alleged grant, and on November 22, 1872, transmitted the papers to the commissioner of the general land office, and on January 24, 1873, the papers were sent to Congress, but Congress never acted upon the same. In 1896, the same claim was filed in the Court of Private Land Claims at Santa Fe, and in September, 1897, the court rendered a decision confirming the grant in part and directing a survey to be made. (Tr., pp. 268–269.)

The court finds that in 1699 the ancestors of complainant, the Pueblo of Laguna, established a town now occupied by the Pueblo of Laguna, and the same has been from said year, 1699, continuously occupied by the mempers of the Pueblo. It finds that the Pueblo was entitled to four square leagues under the Spanish law, but certain

lands are excepted from the confirmation as the property of the United States.

The opinion shows that the alleged grant papers were not genuine, and claimant's title must be determined by the rules which the king of Spain laid down for the government of his representatives in New Mexico for their dealings with the Indians, and then refers to the record of certain proceedings in 1815 before the governor, between the Pueblo of Taos and certain persons, wherein he declared that the king had given to each Pueblo four square leagues of land measuring from the center of the village; that the land was given in entail, and that the Indians were incapable of alienating. (Tr., pp. 271 and 274.)

The survey of the grant was confirmed by the court on August 22, 1899. In the claim filed in the surveyor general's office on June 29, 1857, the west line as claimed by the Indians of the grant to their Pueblo was about two Spanish leagues farther to the west than the west line fixed by the court. (Tr., p. 273.)

The right of way crosses over about two Spanish leagues of public land and then again crosses from east to west the lands heretofore referred to as the Laguna Indian Pueblo tracts. (Tr., p. 273.)

The general characteristics of the country crossed by the right of way in passing from the east line of the Laguna Indian Pueblo tracts to the final west line of the same tracts is the same as heretofore described, with the exception that in several places small portions of land included within each of the grants last referred to as crossed by the right of way were long prior to the location of said line, and ever since said date have been, cultivated, though not enclosed, by the Indians of Laguna. Tr., p. 273.)

No segregation, except as above stated, of the land of this grant from the remainder of the public domain was ever made until the decision of the court referred to, and until that decision it would have been impossible to have located the same. (Tr., p. 273.)

So far as the lands of the Pueblo are concerned, the former governments retained the fee and the right of disposition except where there has been an individual allotment duly confirmed. This government, therefore, possessed the same right. The alleged grants were to the community in general, or rather this was the result from the operation of law, no special grant being made, and the title and power of disposition of outlying lands used in common by the inhabitants, and of all lands within the Pueblo not owned by individuals, was in the king or sovereignty. Therefore, in *United States* v. *Santa Fe*, 165 U. S., 675, on page 709, it is said:

"Moreover, the general theory of the Spanish law on the subject indicates, that even after a formal designation, the control of the outlying lands, to which a town might have been considered entitled, was in the king, as the source and fountain of title, and could be disposed of at will by him or by his duly authorized representatives, as long as such lands were not affected by individual and private rights. This is shown by the quotation from Elizondo, already made. The provisions of law 14, title 12, book 4, of the Recoppilacion (2 White, New Recop., p. 52), which is reproduced in the margin, illustrates the absolute control thus exercised by the king of Spain over the subject."

See, also, page 710, in which it appears that a like power was exercised by Mexico.

To these rights the United States succeeded as the successor of the king of Spain and the government of Mexico. (See page 711.)

In *United States* v. *Sandoval*, 167 U. S., 278, on page 297, it is said:

"Under the laws of the Indies, lands not actually allotted to settlers remained the property of the king, to be disposed of by him or by those on whom he might confer that power. As Mr. Hall says (Chap. VII, 122): 'The fee of the lands embraced within the limits of pueblos continued to remain in the sovereign, and never in the pueblo as a corporate body.' Subsequent decrees, orders and laws did not change the principle."

See, also,

Hayes v. *United States*, 170 U. S., 654.

It would seem also from the foregoing authorities that the Spanish law did not *proprio vigore* confer upon every town or pueblo a grant of four square leagues of land.

It is therefore manifest that over the lands of this pueblo not held in private ownership, and the record discloses no such case, this government had the right and power to grant a right of way to the railroad company. Such lands remained a part of the public domain of this government until Congress should choose to part with the title.

Six and one-half miles of right of way over this alleged grant were therefore exempt from taxation.

Acoma Pueblo.

The right of way, after crossing the west line of the last Indian pueblo tracts, crosses over lands contained in an alleged Spanish grant known as the Acoma Pueblo. The land over which the right of way crosses in this grant is of the same general character as those contained in the other grants, and the Indian pueblo of this grant is out of sight from any point of the right of way. There was some

small acreage cultivated by the Indians, but not enclosed, over which the right of way was located. The right of way over this grant is twelve and one quarter miles in length. (Tr., p. 274.)

An application for this alleged grant was filed in the office of the surveyor general of New Mexico, March 3, 1856, and such application with the recommendation of the surveyor general was transmitted to the commissioner of the general land office September 30, 1856, and was confirmed by Congress December 22, 1858. (Tr., p. 274.)

The survey of this pueblo was first made under the act of Congress in March, 1877, long after the location of the right of way, and on June 5, 1877, it was approved, and on November 19, 1877, a patent was issued; that until this survey was made no one could have located the exterior lines of this grant accurately. (Tr., p. 276.)

The grant appears to be based upon a document made September 28, 1689, by the governor of New Mexico, which purports to set forth the testimony of an Indian as to the alleged boundaries of the pueblo, and another document made in 1689 by the same governor, setting forth the testimony of the same Indian concerning the pueblos of Laguna and Acoma. (Tr., pp. 274–277.)

It is clear that in respect to this grant the same remained a part of the public domain until the title of this government was divested. This was not effected until the survey was made, as required by the act of Congress, confirming the title to the pueblo. While Congress had undoubtedly the right to dispose of the title of the government and grant it to the pueblo, such title did not attach or become distinctly identified until a regular survey had been made. Such survey was absolutely essential to fix

the boundaries of the grant as confirmed by Congress. (*Stoneroad* v. *Stoneroad*, 158 U. S., 240; *Dents* v. *Emmeger*, 14 Wall., 313, and cases heretofore cited.) Before such survey its boundaries could not be identified. (Tr., p. 277.) The description given in the testimony is simply that of a locality in general over which they roamed and part of which they used.

Twelve and one-fourth miles of the right of way over this pueblo were therefore exempt from taxation.

None of the right of way of the Atlantic and Pacific Railroad Company in Valencia County was acquired by purchase or condemnation proceedings, or by the payment of any compensation therefor to anyone. The claim of the company that its location of the right of way in Valencia County was over government land was never objected to by the government of the United States, the Territory of New Mexico, the County of Valencia, or the owners of any of these alleged Spanish grants. (Tr., p. 286.) When the definite location of the right of way was made through Valencia County, everyone supposed that it was over public land of the United States. This claim, maintained for twenty-five years by the railroad company, and acquiesced in by everyone else, including the officials of Valencia County and the territory, clearly prohibited the territory or any of its officers, or the County of Valencia, from saying, as was said in these "additional assessments," that some portion of this right of way was acquired from private ownership.

SIXTH POINT.

A glance at the judgment rendered by the Supreme Court of the territory (Tr., p. 314) discloses the straits that the learned court below was placed in in affirming the jugdment of the District Court. This judgment provides that the territory recover against the present owner of the property formerly owned by the Atlantic and Pacific Railroad Company the sum of sixty-one thousand nine hundred and twenty-two dollars and seventy-three cents ($61,922.73), with interest from the 5th day of October, 1899, and costs, although it was not being pretended or claimed that the Santa Fe Pacific Railroad Company, the owner of the property, was before the court, such judgment clearly shows that it was a judgment rendered without jurisdiction of the person or property sought to be affected.

All of which is respectfully submitted.

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APPENDIX.

Copies of all statutes of New Mexico in force in 1897 which have any bearing on the questions involved.

Section 1. There is hereby established a fiscal year which shall begin on the first Monday of March of each and every year, and end on the first Monday of March next ensuing.

The fiscal year beginning on the first Monday of March, A. D. 1889, shall be the fortieth fiscal year, and thereafter the fiscal year shall be numbered in order of succession. (Ch. 32, Laws of New Mexico of 1889.)

Compiled Law of New Mexico, 1884.

Sec. 2807. The terms mentioned in this section are employed throughout this chapter in the sense herein defined:

First. The term "real estate" includes all lands within the territory to which title or right to title has been acquired; all mines, minerals and quarries in and under the land, and all rights and privileges appertaining thereto, and improvements.

Second. The term "improvements" includes all buildings, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not.

Third. The term "personal property" includes everything which is subject of ownership, not included within the term "real estate."

Fourth. The term "credit" includes every claim and demand for money or other valuable thing, and every annuity or sums of money receivable at stated periods; but pensions from the United States, and salaries, or payments expected for services to be rendered, are not included in the above term.

Sec. 2816. All taxable property shall be listed, assessed

and taxed each year in the name of the owner thereof on the first day of March.

Sec. 2822. The assessor is required, between the first day in March and the first day in May of each year to ascertain the names of all taxable inhabitants, and all property in his county subject to taxation. To this end he shall visit each precinct in the county and exact from each person a statement in writing, or list showing separately:

First. All property belonging to, claimed by or in the possession of under the control or management of such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, cashier or managing agent.

Second. The county in which such property is situated or in which it is liable to taxation.

Third. A description by legal subdivisions or otherwise sufficient to identify it, of all real estate of such person and a detailed statement of his personal property, including average value of merchandise for the year ending March 1st; amount of capital employed in manufactures; number of horses, mules, cattle, sheep, swine and other animals; of carriages and vehicles of every description; jewelry, gold and silver plate; musical instruments; household furniture; moneys and credits; shares of stock of any corporation or company; and all other property not herein enumerated, with the value of the different classes of property in detail.

Sec. 2826. If any person liable to taxation shall knowingly make a false list of his property subject to taxation in this territory for the purpose of avoiding any proper assessment of taxes, he shall be liable to a penalty of twenty-five per cent., to be added to the amount of the taxes assessed upon the true amount and value of his property, and shall also be deemed guilty of perjury.

Sec. 2834. On or before the first Monday in March, annually, the assessor shall make out an assessment book or roll, with appropriate headings, alphabetically arranged, in which must be listed all the property in the county subject to taxation. Such book shall contain the names of the persons to whom the property is assessed, with the several species of property and the value as here-

inbefore indicated, with the columns of numbers and values as given by the person making the return, as fixed by the assessor, and as decided by the county commissioners. At the end of such book or roll, all property assessed to "unknown owners" shall be entered.

Sec. 2835. Each tract of land shall be valued and assessed separately, except when one or more adjoining tracts are returned by the same person, in which case they may be valued and assessed together.

Sec. 2836. The assessor must take and subscribe an oath, to be certified by the officer administering it, and attached to the assessment book, to be substantially as follows:

"I....., assessor of the county of ....., Territory of New Mexico, do solemnly swear that during the whole time allowed by law to make this assessment I have made diligent inquiry and examination to ascertain all the property within said county subject to taxation, and that I have assessed it on the assessment book equally and uniformly to the best of my judgment, information and belief, at its full cash value; and that I have faithfully complied with all the duties imposed upon the assessor by the revenue laws of the territory; and that I have not imposed any unjust assessment, through malice or ill will, nor allowed anyone to escape a just and equal assessment, through favor or reward."

Compiled Laws of New Mexico, 1897.

Sec. 4048. The county commissioners of each county shall constitute a board of equalization for the revision, correction and completion of the assessment rolls. Such board shall hold two regular meetings for this purpose, in each year, at the court house, commencing on the first Monday of June and July. It shall, at its first meeting, have power to supply omissions in the assessment rolls, and, for the purpose of equalizing the same, may increase, diminish or otherwise alter and correct any assessment or valuation, except where such valuation is fixed by law. In case any material changes are made by the board in

the assessment of any person, company or corporation, the clerk shall immediately notify such person, company or corporation, by mail, or otherwise, of the fact, and nature of the change. At either of said meetings, said board shall hear appeals and complaints of those dissatisfied with the assessment by the assessor, and shall decide the same, as in their judgment is proper and right. Any person, company or corporation dissatisfied with the decision of said board may appeal therefrom to the territorial board of equalization, as constituted by and under section two thousand six hundred and thirty-four, by filing a written notice of appeal in the office of the clerk of said county board of equalization, within five days after the rendering of the decision of said board, which said notice of appeal shall state in plain and concise language the grounds upon which said appeal is made. The said clerk shall, within two days after the filing of said notice of appeal, and upon the payment by appellant to said clerk of one dollar, as an official fee for his services, certify in writing to the said territorial board of equalization all proceedings had before said county board, in the matter of said assessment so appealed from, as well as said notice of appeal. The said territorial board of equalization, who are hereby invested with full power to act in the premises, either in increasing, diminishing, exempting, or otherwise altering and correcting any assessment or valuation so appealed from, except valuations fixed by law, shall, on or before the second Monday of August, in each year, and at such time and place as they may designate, hear and determine said appeal, and decide the same, as in their judgment may be right and proper, and the decision of said territorial board of equalization shall be conclusive and final. (Chap. 73, Laws 1887.)

Sec. 1. The governor shall appoint, with the consent and confirmation of the council, one taxpayer from each of the five judicial districts, to constitute the territorial board of equalization; such taxpayers to represent and be of different leading industries of the territory. Such board shall not have more than three representatives of either of the great political parties.

Sec. 2636. Said board shall meet annually on the second Monday of September, at the capitol, as a board

of equalization and appeal only. It shall be the duty of the auditor of the territory at such meeting to furnish said board with the assessment roll of each county of the territory for their inspection and examination, for the purpose of ascertaining the rate of assessment and valuation of property therein, and whenever they are satisfied that the scale of valuation has not been made with reasonable uniformity by the different county assessors, the said board shall adjust and equalize the said assessment rolls by raising or lowering the valuation thereof so that the same shall be of uniform value throughout the territory. Such board, at this meeting, shall have power to hear and determine any appeals taken, as now provided by law, and also any appeals taken by the territory, or any county, which appeals are hereby authorized to be made and taken in the same manner as other appeals from assessments for taxation are now allowed, and it shall be the duty of the solicitor general of the territory to take an appeal from any action of the board of county commissioners on behalf of the territory and the county whenever he shall be requested so to do, by a petition in writing signed by three responsible taxpayers of any county, together with an affidavit signed by at least one of them, showing the grounds for such an appeal, and upon the payment by them of the fee now required by law. Any clerk of the board of county commissioners failing or refusing to send to the secretary of the board of equalization a complete transcript in appeal cases, as now provided by law, within thirty days from the time notice of appeal is filed with said clerk, shall be guilty of a misdemeanor, and on conviction in the District Court shall be fined in a sum not exceeeding one hundred dollars. (Section ——, chapter 12, Laws of New Mexico of 1897, February 17, 1897.)

COMPILED LAWS OF NEW MEXICO, 1884.

Sec. 2839. The board of county commissioners at their June session, or at any special session subsequent thereto, and prior to the first day of September, shall make an order approving the assessment roll as revised and corrected by the board, and levying the taxes for the

year, for territorial, county and school purposes, as provided by law; which order shall be entered of record in their proceedings, and endorsed upon the assessment roll under the seal of said board, and the hand of the clerk thereof.

Sec. 2842. On or before the third Monday in August each year the territorial auditor shall transmit to the clerk of each county a statement of the changes, if any, which have been made by the board of equalization in the assessment, and the clerk upon receiving such statement shall note such changes upon the assessment rolls in a separate column.

Sec. 2843. As soon as practicable after the taxes are levied, the clerk shall make out a tax list in alphabetical order, having columns for names of owners; description and value of real estate; value of personal property; amount of each different kind of tax; total amount of tax; delinquent poll tax and remarks.

Sec. 2844. An entry shall be made upon the tax list showing what it is, and for what county and year it is, and the clerk of the board shall attach to the list a copy of the order levying the tax, and his warrant, under his hand and the seal of the board, requiring the collector to collect the taxes therein levied according to law, and no informality in complying with any of the foregoing requirements shall render any proceedings for the collection of the taxes invalid.

Sec. 2845. The clerk of the board shall deliver the tax list to the collector of the county by the first day of August, or as soon thereafter as may be practicable, and shall take his receipt therefor; and such list and warrant shall be full and sufficient authority for the collector to collect all taxes specified therein, and shall be his justification against any illegality in the proceedings prior to his receiving the list. (Sections 2842, 2843, 2844 and 2845 of the Compiled Laws of New Mexico of 1884.)

Sec. 2847. If by any means any property shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same when discovered shall be listed by the assessor and placed upon his roll before the same is returned to the board of county commissioners, with all arrearages of taxes which should have been

assessed and paid in former years charged thereon, or in case of failure of the assessor the same shall be assessed by the collector in the manner provided in the next section.

Sec. 2848. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate, or any personal property then in his county, are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list following the entries made by the clerk (and such entries shall be designated as "additional assessments"), and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the board of county commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him.

Sec. 2849. Every tax levied according to the provisions of this act shall have the force and effect of a judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon from the date of the levy thereof, and taxes due from any person upon personal property shall not be satisfied nor the lien removed until the taxes are abated or paid, or the property sold for the payment thereof. The tax list and warrants hereinbefore provided for shall have the force and effect of an execution against the person or property assessed.

Sec. 2850. On delivering the tax list and warrant to the collector the clerk must charge the collector with the full amount of the taxes levied, and if the delinquent tax list is transferred from one collector to another the clerk must credit the one and charge the other with the amount then outstanding on the tax list. All such amounts shall remain a charge against the collector until collected and accounted for or abated by the county commissioners.

Sec. 4061. One-half of the taxes upon real estate shall, as between vendor and purchaser, become a lien upon such real estate on and after the first day of January in each year, and the other half on and after the first day of July in each year. (Chap. 61, Laws 1893.)

Sec. 4062. No personal demand for taxes shall be necessary, but it is the duty of every person subject to taxation to call upon the county collector between the 1st day of August and the 1st day of January following, and pay half his taxes, and to call upon the county collector between the 1st day of August and the 1st day of July in the following year and pay the other half of his taxes; and if any person shall fail or neglect to pay his taxes as hereinabove provided until after the 1st days of January and July following the levy thereof, the collector shall proceed to make the same by distraint and sale of his personal property, and the tax list shall be sufficient warrant for such distraint. It is, however, the duty of the collector to visit each precinct in his county to receive the taxes, first giving ten days' notice of the time and place appointed by him, by hand bills posted in at least three public places in the precinct. He shall give such notice immediately after receiving the tax lists: *Provided*, That when the collector negligently or willfully fails or refuses to collect any of such taxes, or to make such distraint, he shall be liable on his bond for the full amount of such taxes so failed to be collected or distrained for, together with interest at twelve per cent.

Sec. 4066. On the 1st day of January in each year half of the unpaid taxes for the year last past, and on the 1st day of July in each year the remaining half of the unpaid taxes for the year last past, shall become delinquent and shall draw interest at the rate of twenty-five per cent. per annum, but the collector shall continue to receive payments of the same after the first day of January and July until the day of sale. (Chap. 61, Laws 1893.)

COMPILED LAWS OF NEW MEXICO, 1884.

Sec. 2883. Omissions, errors or defects in form in any assessment list or tax roll, when it can be ascertained therefrom what was intended, may be supplied or corrected by the assessor at any time before the return of the assessment roll to the collecter, or by the collector at any time after the receipt of such roll by him. When any omission, error or defect has been carried into a delinquent tax list, or any error appears in any publication, the list or publication may be amended by the collector and republished as amended; but such publication must be made in the same manner as the original publication and for not less than one week.

COMPILED LAWS OF NEW MEXICO, 1897.

Sec. 4157. Whenever, in his judgment, it may be proper, the attorney general, district or county attorney shall bring suit at law for the recovery of taxes which may be due from any person, or upon any property, where the amount exceeds one hundred dollars. Such suit shall be in the name of the territory, and shall be against the person assessed, except where the assessment is against unknown owners, in which case the suit shall be against the property which is liable for the tax. If the tax be a lien upon any real estate, the fact shall be stated in the declaration, together with a description of such real estate. The suit shall be for the full amount of territorial, county, school or license taxes then due and unpaid, whether by reason of one or more than one assessment. The judgment in such a case, if in favor of the territory, shall, in addition to other ordinary requisites, contain a description of the real estate, if any, upon which such taxes is a lien, and shall itself be a lien thereon, and shall contain an order for the sale thereof. The order of sale shall likewise contain a description of such real estate, and shall be directed to the sheriff of the county wherein such real estate is situate: *Provided*, That in such cases no ap-

praisement shall be required. The judgment rendered in such suit shall also have the effect of a general judgment against the person. When suit is brought under this section against real estate, process shall be served upon any person residing upon, or exercising authority over, the premises, if any there be, and by publication, as now required by law in the case of non-resident defendants, and such service shall bind all persons having interest in such real estate.

COMPILED LAWS OF NEW MEXICO, 1884.

Sec. 345. The board of county commissioners shall have power at any session:

* * * * *

Tenth. They shall also constitute boards of equalization of taxes and to hear appeals from the action of the assessors who make the assessments; they shall revise the lists of assessments within their respective counties, and shall correct the same, and shall hear and determine all appeals of assessments that may be brought before them, as required by law, and in no event shall the said commissioners levy any assessment of taxes exceeding one per cent.

* * * * *

Sec. 343. Said board of county commissioners shall meet at the county-seat of each county on the first Monday in January, April, July and October in each year, and at such other times as in the opinion of the board the public interests may require.

No. 181.

Reply Brief of Appellants.

In the

Dunlap for Appellants

Supreme Court of the United States.

October Term, A. D. 1901.

Filed Oct. 31, 1901.

THE UNITED STATES TRUST COMPANY OF NEW YORK AND C. W. SMITH,
Appellants,
vs.
THE TERRITORY OF NEW MEXICO,
Appellee.
No. 181.

REPLY BRIEF OF APPELLANTS.

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THE TERRITORY OF NEW MEXICO, APPELLEE.

No. 181.

REPLY TO THE POINTS AND AUTHORITIES CONTAINED IN THE BRIEF OF APPELLEE.

FIRST.

I.

The first point made by appellee is, that this court is without jurisdiction to hear this cause, by reason of the failure to comply with the act of Congress approved April 7, 1874. The proviso contained in the second section of the act of Congress referred to reads as follows:

"*Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict * * * shall be made and certified to

by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree * * *."

The certificate of the court below contains, among other things, the following recital (the italics are ours):

"The court hereby certifies for use upon the appeal of the said The United States Trust Company, of New York, and C. W. Smith, receiver, that this case was tried in the court below upon an agreed statement of facts, which agreed statement of facts was made part of the record in the District Court, and part of the record upon appeal to this court, and is to be a part of the record on appeal to the Supreme Court of the United States; that the said agreed statement of facts sets out the facts of this case which were heard or considered by this court upon said appeal, *and the same is hereby adopted by this court as its statement of such facts* for use upon the appeal aforesaid without here repeating the same." (Tr. p. 316.)

It not only appears that the agreed statement of facts upon which the case was heard in the court below was adopted and made a part of the record in the case before the Supreme Court, but it also appears that the same was adopted by the Supreme Court "*as its statement of such facts for use upon appeal.*" This certificate, we submit, shows a direct and full compliance with the provisions of the Act of Congress referred to. It is a duplicate of the certificate procured by the learned counsel in his appeal to this court in the case heard and determined in the case of the Territory of New Mexico, appellant, *v.* C. W. Smith *et al.* (172 U. S. 171).

II.

It has been held by this court, in many cases, that an agreed statement of facts, made part of the record,

in a case tried by a court, without a jury, is the equivalent of a special verdict, and constitutes a sufficient compliance with the provisions of sections 649 and 700 of the Revised Statutes of the United States, which, in their requirements, are substantially equivalent to the act of Congress hereinabove referred to. In the case of Supervisors *v.* Kennicott (103 U. S. 554), Chief Justice Waite, in delivering the opinion of the court upon this question, said:

"Even before the act of 1865, c. 86, sect. 4 (13 Stat. 501, reproduced in sections 649 and 700, Rev. Stats.), it was always held that a judgment on agreed facts spread at large on the record should be reviewed here on a writ of error. (U. S. *v.* Eliason, 16 Pet. 291; Simpson *v.* Baltimore & Susquehanna Railroad Co., 10 How. 329; Graham *v.* Bayre, 18 *id.* 60; Suydam *v.* Williamson, 20 *id.* 427; Campbell *v.* Boyreau, 21 *id.* 223; Burr *v.* Des Moines Co., 1 Wall. 99.) Such a statement was considered to be equivalent to a special verdict, and to present questions of law alone for the consideration of the court."

Justice Brewer, in speaking for this court in the case of Lehnan *v.* Dickson (148 U. S. 73), said:

"It is true, if there be an agreed statement of facts submitted to the trial court and upon which its judgment is founded, such agreed statement will be taken as an equivalent of a special finding of facts. Supervisors *v.* Kennicott, 103 U. S. 534."

In the case of Stringfellow *v.* Cain (99 U. S. 610), it was held by this court, on an appeal from the Supreme Court of the Territory of Utah, that the adoption by the Supreme Court of the Territory of findings, made by the District Court, would be a sufficient statement of the facts of the case, within the meaning of the act of Congress approved April 7, 1874.

Again, in the case of Haws *v.* Victoria Copper Mining Co. (160 U. S. 303), Mr. Justice White, in delivering the opinion of the court, says:

"The statement of facts contemplated by the statute is one to be made by the Supreme Court from whose judgment the appeal is taken. But where that court confirms the findings of the trial court, being those adopted by the Supreme Court of the Territory, they subserve the purpose of a finding of fact on the appeal to this court. Stringfellow *v.* Cain, *supra*."

See also, to the same effect:

Apache County *v.* Barth, 177 U. S. 540.

III.

Many of the most important questions presented by the record in this case grew out of the ruling of the Supreme Court in affirming the judgment of the District Court, in overruling the motion to dismiss this intervening petition; in overruling the plea in abatement filed; in overruling the plea in bar filed; and in overruling the demurrer. Each one of the questions above mentioned can be considered by this court, upon this appeal, regardless of the question as to whether it can review, or not, the facts considered by the courts below upon the trial of this case upon its merits.

IV.

It is true that the agreed statement of facts used in the court below, and adopted by the Supreme Court, contained, in relation to the disputed fact as to whether any notice of the assessment in controversy was given or not, the conceded testimony of several witnesses, and as to this question it did not, and does not, state fact agreed upon, but

simply the evidence *pro* and *con* thereon; but the Supreme Court of New Mexico made a finding of fact upon this testimony, finding that a notice was sent to the solicitors of the Receiver and of the Trust Company (Tr. p. 317). The agreed statement of facts also contains the conceded testimony of two witnesses concerning one other fact that could not be agreed upon, to wit, the question of the value of the railroad property for the purposes of taxation. The Supreme Court again found upon this testimony the ultimate fact (Tr. p. 317).

SECOND.

I.

The second point made in the brief of appellee, is that "the purchasers at the foreclosure had ample notice of the claim of the Territory." While this statement is entirely incorrect, and not supported by the record, it would be very difficult to understand what force it would have if it were correct. The argument of counsel in support of it seems to be made for the purpose of establishing another proposition, to wit, the proposition that the purchasers at the sale of the property in controversy, were given the notice required by the final decree of foreclosure of the intention on the part of the Territory to file this intervening petition. The entire basis upon which the proposition and the argument is made, as contained in the record, is the following statement of Mr. Clancy, in an affidavit filed by him upon the hearing of the motion to dismiss, and the facts contained in the agreed statement of facts, each of which are as follows:

"Affiant states that at the time of the presentation to this court of the report of the foreclosure sale in this cause and the asking of a confirmation of said sale, he attended before the court for the purpose of having inserted in the order of confirmation a provision that the sale was made subject to the payment by the purchasers or their successors or assigns of any unpaid taxes which might be adjudged to be a lien upon the property sold; that at said time there were present Mr. Aldace F. Walker and Mr. Victor Morawetz, two of the purchasers at said sale, and perhaps Mr. R. Somers Hays, the third purchaser, but of this affiant is not now certain; there were also present Mr. C. N. Sterry and Mr. E. D. Kenna, who was and is, as affiant understands, the principal law officer of the whole Santa Fe system of railroads;

that at said time and place affiant stated that arrangements had been made for his employment by the counties of Bernalillo and Valencia, under authority of an act of the legislative assembly of 1897, for the purpose of prosecuting claims against the property sold for taxes, which had been levied for four or five years in said counties, the validity of which was in dispute, the railroad authorities claiming that the Congressional exemption set out in the second section of the act of Congress of 1866, incorporating the Atlantic and Pacific Railroad Company, extended to the property upon which the taxes had been levied; that a long discussion ensued, in the course of which affiant distinctly recollects that it was urged by some of the gentlemen present that the decree of foreclosure had said nothing on the subject of unpaid taxes, and that it was not fair to the purchasers to saddle them with any additional liability in the order of confirmation, to which affiant replied in substance that if the purchasers had been misled or deceived by the decree of foreclosure it was not too late for them to recede from their purchase and refuse to take the property if additional and unexpected burdens were imposed; that in answer to a suggestion made, as affiant now recollects by Mr. Kenna, that if the taxes were a lien on the property that lien could not be divested by the sale of the property, affiant answered in substance that in his opinion this was true, but he desired to have inserted in the order of confirmation such a provision as he asked, so that it would be impossible for the purchasers at any future time to set up that they had made the purchase without notice of the existence of such claimed taxes and thus to eliminate one possible point of dispute or discussion in any later proceeding. Affiant further states that as a final result of the said discussion, and by agreement of the counsel present, there was inserted in the said order of sale such a provision as he asked, in language drafted by Mr. Kenna, approved by affiant, and assented to by the purchasers present, that clause being in the words following, to wit: 'including also any taxes which may finally be adjudged to be a lien upon the property and sold under the decree aforesaid.' (Affidavit, Tr. pp. 125–126.)

"That at the time of the confirmation of the sale under

the decree of foreclosure, F. W. Clancy had been retained to collect any back taxes that might be due upon the property of the railroad company in Valencia county for any of the years referred to, and that at that time he stated to the court in the presence and hearing of the purchasers that he did not wish such purchasers to afterwards say that they had purchased said property without notice of the fact that there were claims for taxes in the two counties of New Mexico through which said railroad ran, covering a series of years, which were to be enforced, if possible, as a lien upon the property of said railroad company, one of which claims, that for the county of Bernalillo, had already been disposed of adversely to the county in the Supreme Court of New Mexico, and was then standing upon appeal taken by the Territory to the Supreme Court of the United States." (Agreed statement of facts, Tr. p. 284.)

The court will remember, that at the time of the confirmation of this sale, the taxes sought to be recovered by this intervening petition, were not yet levied; the assessments, on which they were based, were not yet made; that there were upon the tax rolls of Valencia county, at that time, assessments of the property in controversy for each of the years involved, with a levy of taxes extended against such assessments. It is therefore apparent that the taxes Mr. Clancy talked about at that time, and the taxes referred to in the decree of confirmation, were taxes that were then apparently in existence and apparently levied upon this property, *and not taxes which were to be levied in the future.* A notice to the purchasers that Mr. Clancy had been employed to collect taxes then existing would not be a notice to such purchasers that he was going to file an intervening petition for taxes to be levied more than a month afterwards, upon assessments not then made.

II.

We are not aware of any suggestion in our original brief that the purchasers should have been made parties to this intervening petition, as stated by appellee on page 11 of its brief. If, as stated in our original brief, the appellee had made a demand for the taxes sued for, and then had given notice of an intention to file an intervening petition to recover the same, the purchasers, or their assignee, would have had the notice required by the decree, and would have been compelled to assert the option given them, of either making themselves parties or permitting a default.

III.

It is asserted on page 11 of appellee's brief that Mr. Sterry was employed by the purchasers for any pending or future litigation against the receiver. This, as we have shown on page 63 of our original brief, in answer to the same assertion by the learned court below, is incorrect.

IV.

On June 2, 1897, the master made a deed to the purchasers of the property in controversy. (See appellee's brief, p. 3, and agreed statement of facts, Tr. p. 283.) Pursuant to each of the decrees, upon the conveyance of this property by the master, the purchasers, or their assignee, had the right to immediate possession of the property involved, and the property passed out of the custody of the court, the receiver thereafter holding it as trustee for the owners (Very *v.* Watkins, 23 How. 474), so that, when the intervening petition was filed the court no longer had custody of the property, although its receiver did not act-

ually deliver the property to the assignee of the purchasers until twenty days after the filing of the intervening petition.

Appellee seems to make some point upon the fact that the deed itself was not recorded until June 12th, and that the public had no notice of its existence until its record, ignoring the fact that its learned counsel, representing it, was before the court, at the time of the confirmation of the sale to the purchasers, for the purpose of insisting upon certain things being entered in the decree of confirmation for the protection of appellee. The appellee, at the date of confirmation, received full knowledge of the fact of the sale of the property, its confirmation and the transfer thereby of the equitable title thereto, to the purchasers, and the right of the purchasers, at any time thereafter, to receive a conveyance and a delivery of the possession of the property. In view of this, it hardly lies in the mouth of the appellee to say that it was in ignorance of the fact of the conveyance of the property, until the public record of the deed of conveyance on June 12th.

THIRD.

It is insisted, under the third point in appellee's brief (see pages 12 and 13), that the court had the custody of this property at the time when these proceedings were commenced, and hence that the proceedings were properly commenced, and a sufficient notice thereof was given to the purchasers by notifying the receiver and the Trust Company. In making this contention, appellee, on page 13 of its brief, insinuates, rather than asserts, that no deed was executed on the 2d of June, by twice quoting from an affidavit of Mr. Sterry made upon the motion to dismiss. That the deed was actually executed and delivered on June 2d appears from the statement of facts made by the learned counsel for appellee, on page 3 of his brief, and also from the agreed statement of facts made by the court. (Tr. p. 283.)

It seems hardly necessary to say in answer to this contention that the appellee and its learned solicitor, knowing of the sale of the property in controversy to the purchasers, and its confirmation by the court more than thirty days prior to the filing of the intervening petition, were not attempting to invoke the aid of the court in enforcing the provision that the purchasers should pay as part of the purchase price the taxes claimed. The court having passed the legal title to the property by the deed, with the right of possession upon demand under the decision of this court (Very *v.* Watkins, *supra*), divested itself of the control of the property, and hence the only relief it could possibly have granted upon this intervening petition was to order the payment of the claims presented out of the funds in the hands of the receiver, a matter which would not have concerned the purchasers, but would have concerned the trust company and the receiver, and hence the requirement of notice to these parties and to no one else.

FOURTH.

I.

It is contended by appellee, on pages 14 to 17 of its brief, that when the collector acts, under the provisions of section 4056 of the Compiled Laws of New Mexico (set out on page 16 of its brief), no particular description of the property assessed is necessary. The statutes quoted by the learned counsel, on pages 15 and 16 of themselves refute the point made. In the first place the assessor must visit each tax payer and exact from him, in writing, a list which shall describe specifically the real estate owned by such tax payer, subject to taxation, either by legal subdivisions or otherwise sufficient to identify it. When the collector puts an additional assessment of property upon the tax list, as property omitted from the assessment roll, the requirement is that he shall list it. The listing required of the collector in such a case is the listing required of the tax payer by the assessor, and must embrace the same sort of description that the list exacted from the tax payer is required to contain.

Lehrman Durr & Co. *v.* Robinson *et al.*, 59 Ala. 219.
Cooley on Taxation (2d ed.), pp. 351–404.

As stated by Judge Cooley in his text:

"In listing the land it must be described with particularity sufficient to afford the owner the means of identification and not to mislead him. * * * The purposes in describing the land are, first, that the owner may have information of the claim made upon him or his property. * * * 'Notice,' it is well said, or at least the means of knowledge, is an essential element of every just proceeding which affects the rights of persons or of property. But how can the duty of the payment of taxes be performed

without the identity of the subject-matter of the duty being made known to him who is to perform it, by name or description?"

Cooley on Taxation (2d ed.), pp. 404, 405.

See also authorities cited in notes to text.

II.

In the case at bar there was ninety-three miles of right of way in Valencia county. Some of this right of way was claimed by the taxing authorities in 1895, and subsequently, to have been acquired over lands held in private ownership; it is, however, conceded that the railroad company claimed that its entire right of way was over public lands, as it never bought, purchased, or condemned a foot of it, hence the necessity of describing the portion claimed by the authorities to have been acquired from lands held in private ownership and therefore taxable, was and is clearly apparent, which was not done in the additional assessments in controversy.

III.

Assuming that the court had jurisdiction to entertain this intervening petition, and to determine any claims contained therein to be a lien upon the property involved, upon what part of the ninety-three miles of road mentioned in the intervening petition was this lien to be established?

The right to bring an action to recover these taxes is regulated by section 4157, of the present Compiled Laws of New Mexico, which were in force at the time of the filing of this intervening petition. (Appendix to original brief, page 164.) This statute provides that, "if the taxes be a lien upon any real estate the facts shall be stated in the declaration, together with the description of such real es-

tate." Neither in the assessment nor in the intervening petition was there any attempted description of the right of way, which was claimed was not exempt from taxation. It therefore seems to us, as we urged in our original brief, that the demurrer to the intervening petition should have been sustained.

IV.

The argument of the learned counsel for appellee, on page 14 of his brief, is in direct opposition to the text of the learned author, whose work we have already cited. It is urged that the questions raised by the demurrer are not worthy of much consideration on account of the fact that it was not filed until two years after the intervening petition was filed. The court will remember, in answer to this contention, that the intervening petition was filed on June 10, 1897, and dismissed on June 22, 1897, hence it was not in court to have anything filed to it until its reinstatement in September, 1899, and then immediately following its reinstatement, or within less than thirty days, the demurrer in question was interposed to it.

Fifth.

I.

In reply to the argument contained under the sixth point of appellee's brief (pages 18 to 23), we have to say, in addition to the arguments in our original brief, that the right of way itself, being placed upon the assessment roll in each year up to 1895, included all of the superstructure that had been placed upon it, and therefore such superstructure was not omitted from the assessment rolls of 1892, 1893, and 1894. In 1895 and 1896 the assessments placed upon the rolls by the assessor at the proper time were of the identical property attempted to be placed on the rolls by the collector in 1897. (See pages 18 and 20 of appellee's brief.) The description of the property, as we say, was identical; it was of the superstructure placed upon the right of way, and not of the right of way itself, and the assessment in each of these years fixed the value of such property so listed at $6,500.00 per mile. While it is true that it alleged there were 93.7 miles, yet it was no more incorrect in that respect than was the assessment made by the collector. The collector says that there were 60.7 miles not exempt, when, as a matter of fact, under any construction, there was only some 55 miles that was assessable. If the assessment made by the collector was valid as to property not exempt, in that the fixing of the rate per mile would enable the court to determine when the actual mileage was found the amount due, the same reasoning would necessarily apply to the assessments made by the assessor in 1895 and 1896. Counsel says, on page 21:

"The collector in the present case listed 60.7 miles of the road running over land held in private ownership when

the railroad company acquired this road, all of such road being clearly taxable. He has assessed nothing except taxable property. The proof shows that his estimate is too much, and that there are only 55.5 miles of such road. On account of this mistake, certainly the would be evader of taxes cannot be heard to say that the whole assessment is void and he will pay nothing."

Wherein is the reasoning of the learned counsel less applicable to the assessments of 1895 and 1896 made by the assessor and quoted on page 20 of his brief?

II.

The learned counsel, on page 22, asserts that it makes no difference to the "*would-be evader of taxes*" whether they pay under the original or under the additional assessments for 1894, 1895, and 1896. This statement is incorrect, as to the year 1894. In the year 1894 the original assessment of the right of way, made by the assessor, was $607,477, while the amount of the assessment made by the collector for the same year is $609,050 (see Exhibit 9, Tr. p. 193, and Exhibit 10, p. 196). For the years 1892 and 1893, the assessment made by the collector was nearly double that which was made by the assessor. (See Tr. p. 178; Exhibit 6, p. 183; Exhibit 7, p. 186; Exhibit 8, p. 190.)

This is not an action wherein the appellants are seeking to restrain the collection of some taxes, and would therefore have to tender such taxes as might be legally due, but it is an action in which the Territory is seeking to enforce specific levies of taxes, and hence appellants have a right to say that, if these levies were made upon an assessment that was absolutely void, and the assessment and the levies were made without authority of law, they cannot be enforced in this action, though the action itself be an equitable one.

Sixth.

I.

In reply to the proposition made by the learned counsel under his seventh point, on page 23 of his brief, that the collector, on June 7, 1897, had a right to make these additional assessments on the tax list for 1896, we desire to say, in addition to that already stated in our original brief, that the laws of New Mexico require that all taxable property should be listed, assessed, and taxed each year, in the name of the owner, on the first day of March. (See appendix to original brief, p. 156, sec. 2816.) This is in accordance with the usual custom.

Cooley on Taxation (2d ed.), p. 354.

This provision applies equally to property which is to be placed upon either the assessment roll or the tax list as property omitted in previous years. This court had occasion to examine a very similar statute in relation to the assessment of omitted property in Minnesota, in the case of Winona & St. Peter Land Co. *v.* State of Minnesota (159 U. S. 526), in which it was contended that the placing of omitted property upon the tax list, and assessing it for the taxes of the years when it was omitted from the assessment rolls, was unconstitutional, in that it was taking property without due process of law, and in answer to this point, Mr. Justice Brewer, delivering the opinion of the court, said:

"If any real or personal property shall be omitted in the assessment of any year or years and the property shall thereby escape taxation, when such omission shall be discovered the county auditor shall enter such property on

the assessment and tax books for the year or years omitted, and he shall assess the same and extend all arrearage of taxes properly accruing against such property with seven (7) per cent. interest thereon, from the time said taxes would have become delinquent, and the same shall be extended against such property on the tax list for the current year.

"This being an amendatory statute, places the amended section as part of the general tax law, and it is to be construed accordingly. The section provides that if any property shall have been omitted from the assessment of any year it shall, upon discovery of that fact, be entered upon the assessment and tax books for that year; that all taxes for that year be charged thereon against it, with interest, and then extended against it on the tax list for the current year. In other words, for the purposes of collection, it stands on the tax list for the current year the same as any other property, and all taxes thereon are to be collected in the same manner. The amount of the tax for the omitted year is the same as that which was enforced against all other properties for that year, so that the only difference is in the mode of assessment and the charge of interest."

The learned Justice then proceeded to show that the general statutes in relation to taxation gave each person, during each current year, the notice required by law to be given, in order to prevent the taking of property without due process of law.

If the statutes of New Mexico are to be construed as providing that the collector of taxes can, in the middle of a fiscal year, place property upon the tax list of the preceding year, assess it, and extend a levy of taxes against it, without any notice to the owner of the property of such action, then the enforcement of such taxes must be held to be the taking of property without due process of law. On the other hand, if the collector, in placing property as

omitted property upon the tax list, must place it upon the tax list of the current year in which he acts, then such notice as is required by law is given to the owner of such property, under the many decisions of this and other courts.

Seventh.

The eighth point in the brief of appellee states the proposition, that "there was an opportunity to appeal from the additional assessment made by the collector." The argument made by the learned counsel under this point is, in substance, that the United States Trust Company and the receiver were each notified of the filing of the intervening petition, which of itself disclosed that these assessments had been made. The obvious answer to this is, that neither the receiver nor the Trust Company were interested in taking any appeal, as neither of them had any interest in the property, which at that time had been conveyed to the purchasers; but if they or either of them had the right to take an appeal, there was nothing contained in the intervening petition giving them notice that they should or could exercise such right. A reference to the intervening petition and its exhibits will show just what the tax list of Valencia county for 1896 show, and that is, that the dates of the making of these additional assessments were either purposely or otherwise omitted from the tax list when these assessments were first called to the notice of anyone by the filing of the intervening petition. The receiver and the Trust Company had the right to assume that these assessments on the tax list for 1896 were made by the collector between the first day of September, 1896, and the first day of January, 1897, or at the latest the first day of March, 1897, and that the time to appeal, even if an appeal could be taken within a reasonable time, had expired long prior to the filing of the intervening petition.

The learned counsel, in further argument upon this proposition, suggests that the collector had no necessity of

notifying the owners of this property of these assessments, because—

"he could not know they were interested parties, because the deed to the purchasers, made as of the date of June 2, 1897, only five days before he acted, was not placed of record until June 12, 1897, five days after he acted."

The learned counsel, in making this statement, surely forgot the fact that under his employment he was present at the time the sale to the purchasers was confirmed, and had exact knowledge that the property in controversy had been sold, and who the purchasers were, two of them being present at the confirmation. With this knowledge the learned counsel prepared a notice for the collector at the time of his making this assessment on June 7, and instructed the collector to give such notice to the solicitor of the receiver and the Trust Company only. (Tr. p. 282.)

It is not going out of the way to say that under the facts it is apparent that there was an intentional omission to notify the purchasers of the fact of this assessment.

EIGHTH.

The ninth point in appellee's brief makes the proposition that the listing of the omitted property, on June 7, 1897, and the extending of taxes for the previous years against the valuation made at that date, created a lien upon the property, as of the date in each of the respective years the county commissioners made for such years their levies. The only authorities cited by counsel in support of this proposition are Peters *v.* Meyers (22 Wis. 576). This case, upon examination, will be seen to be entirely inapplicable, as it was based upon express statutory provisions of the State of Wisconsin.

Section 4057 of the Revised Statutes, quoted on page 27 of appellee's brief, provides that "taxes upon real estate are hereby made a lien thereon from the date of the levy thereof" It must be conceded that no taxes can be levied upon real estate under a system of taxation such as was in vogue in New Mexico without a preceding assessment. As stated by Judge Cooley in his work on Taxation:

"An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support and are nullities. The assessment is, therefore, the most important of all the proceedings in taxation."

Cooley on Taxation (2d ed.), pp. 352, 353.

The listing and the valuation of this property, which constituted the assessment made by the collector, was not made until June 7, 1897. Until that was made there were, and could be, no taxes levied against this property. The levy

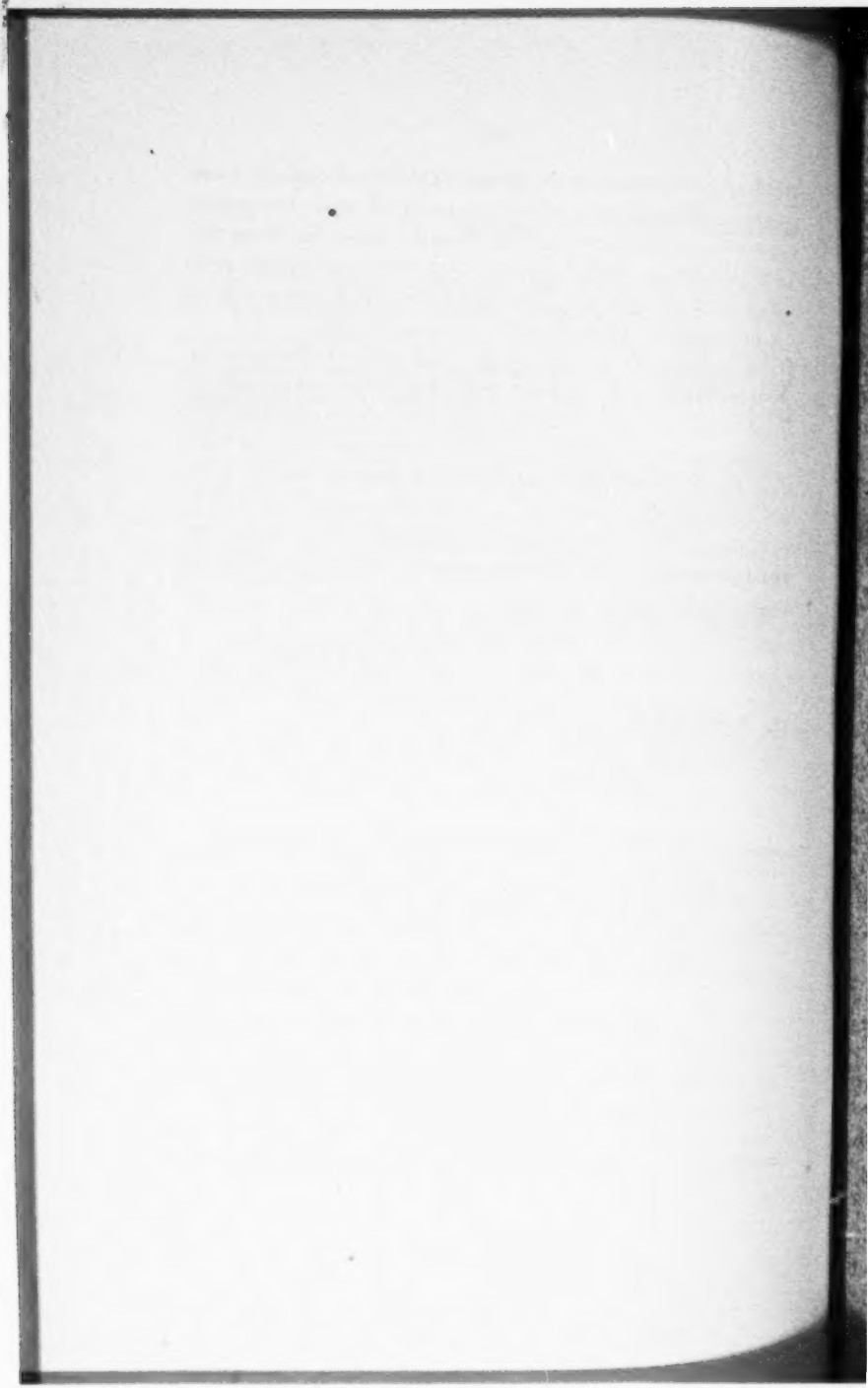
required to be made by the Board of County Commissioners becomes effectual only when it is indorsed upon the assessment roll, under the seal of the Board; hence the levies for 1892 to 1896, inclusive, indorsed upon the assessment rolls for each of those years, were not levies upon any property not contained in each of such assessment rolls.

The purchasers at the sale of the property in controversy were notified by Mr. Clancy that there were taxes claimed for preceding years; they were by such notice charged with everything that appeared upon the assessment and tax rolls concerning this property at that time, but necessarily were not charged with notice of an assessment and levy not in existence, and which was not made until thirty days after their purchase. See in this connection authorities cited on page 70 of our original brief.

All of which is respectfully submitted.

C. N. STERRY,
Solicitor for Appellants.

E. D. KENNA,
ROBERT DUNLAP,
Of Counsel.



No. 181.

Petition for Rehearing.

OFFICE SUPREME COURT OF U. S.
RECEIVED
FEB 15 1902

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

The United States Trust Company of New York and C. W. Smith,
Appellants,
vs.
The Territory of New Mexico,
Appellee.

No. 181.

PETITION FOR RE-HEARING.

C. N. Sterry,
Solicitor for Appellants.

E. D. Kenna,
Robert Dunlap,
of Counsel.

DeMass Bowers, Law Printer, Los Angeles, Cal.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1901.

The United States Trust Company of New York and C. W. Smith, Appellants, vs. **The Territory of New Mexico,** Appellee.	*No. 181.*

PETITION FOR RE-HEARING.

Having carefully examined the opinion of this Honorable Court in the above cause, we think that with propriety, we may ask the Court to consider whether this case, be not one, in which it will be proper, to grant a re-hearing to the appellants, upon the grounds hereinafter stated:

FIRST.

I.

THE RECORD IN THIS CASE CLEARLY DISCLOSES; THAT THE PETITION IN INTERVENTION WAS NOT FILED, OR INTENDED TO BE FILED, IN ACCORDANCE WITH THE TERMS OF EITHER DECREE, OR TO ENFORCE THE PROVISIONS OF EITHER OF SUCH DECREES; WAS NOT, AND WAS NOT INTENDED, TO PRESENT ANY CLAIMS AGAINST THE PURCHASERS, OR THE PROPERTY; THAT THE TAXES DESCRIBED IN THE INTERVENING PETITION WERE NOT INCLUDED IN THE TAXES COVERED BY ANY TERMS OF THE DECREE OF CONFIRMATION. THE OPINION FILED MAKES IT CLEAR, THAT THIS COURT, IN DECIDING THE CASE, ERRONEOUSLY, THROUGH MISUNDERSTANDING OF THE RECORD, DETERMINED THAT THE INTERVENING PETITION WAS FILED TO ENFORCE THE PROVISIONS OF THE DECREES, AGAINST THE PURCHASERS, AND THE PROPERTY, IN RELATION TO TAXES SPECIFICALLY COVERED BY THE TERMS OF THE DECREE OF CONFIRMATION.

It was claimed by appellants, upon the hearing before this Court that this intervening petition should either have been dismissed in the District Court, upon the motion made therefor, the evidence in support of it, or that the plea in abatement should have been sustained, upon the several grounds stated in the motion, and the plea (Pr. Tr. pp. 107 to 129). The first ground of the motion and plea were based upon the fact that prior to the reinstatement of this case, under the mandate of this Court, the receiver had made his final accounting, and had been discharged, and that at the time of the reinstatement of this case, he had no funds in his hands belonging to the estate, or which could be applied to

the satisfaction of any claims, stated in the intervening petition.

The written argument made by appellants, in support of this proposition, is found upon pages 47 to 56 of their brief filed in October last, our contention therein being in substance the proposition above stated.

In answer to this proposition it is said in the opinion:

> "That the receiver had been discharged before such mandate was filed, or final proceedings had, is immaterial, as the grantee of the purchaser (the present owner of the property) had made itself a party to the record by coming in and praying for the publication of a notice to cut off claims."

This answer of the Court is clear evidence, to our minds, that the Court, in passing upon our claims, entirely failed to understand the record, in respect to the matter above stated, as the record *conclusively* shows, that this intervening petition was not filed, or attempted to be filed, as a claim against the purchasers, or the property purchased, or to enforce any claim provided for in either of the decrees, or pursuant to the provisions of either of them, concerning any taxes mentioned in the decree of confirmation.

If the Court will read the following statement of the facts in this matter, as they appear upon the record, it will be unable to reach any other conclusion, than that it misunderstood the record in this respect, when it rendered its late decision.

The final decree in this case was entered on the 10th of April, 1896 (Pr. Tr. p. 29), and it provided, among other things: that upon a sale of the property the purchaser, or purchasers, should, as part of the consideration and pur-

chase price of the property, in addition to the amount bid (the italics are ours)—

> "pay, satisfy and discharge * * * any indebtedness and obligations or liabilities * * * legally contracted or incurred by the receiver before delivery of possession of the property sold, * * * also by any indebtedness and liabilities contracted or incurred by said defendant railroad company in the operation of its railroad prior to the appointment of receivers, which are prior in lien to said first mortgage, and which shall not be paid or satisfied out of the income of the property in the hands of the receiver, upon the court adjudging the same to be prior in lien to said mortgage and directing payment thereof. * * * in the event that said purchaser or purchasers *shall refuse, after demand made*, to pay any such indebtedness, obligations or liabilities, *the person holding the claim therefor may, upon fifteen days' notice to said purchaser or purchasers, their successor or successors, assign or assigns, file his petition in this court to have such claims enforced against the property aforesaid, in accordance with the usual practice in relation to claims of a similar character;* and such purchaser or purchasers, and his or their successor or successors, assign or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, and either party shall have the right to appeal from any judgment, decree or order made thereon. And jurisdiction of this cause is retained by this court for the purpose of enforcing the foregoing provisions of this decree; and the Court reserves the right retake and resell said property in case the purchaser or purchasers, his or their successors or assigns, shall fail to comply with any order of the court in respect to the payment of such prior indebtedness, obligation or liabilities within thirty days after service of a copy of such order." (Pr. Tr. pp. 39, 40.)

The foregoing provisions were all of the provisions relative to the presentation of claims, which anyone might desire to present, *pending the time* intervening be-

up that they had made the purchase *without notice of the existence of such claimed taxes* and thus to eliminate one possible point of dispute or discussion in any later proceeding. Affiant further states that as a final result of the said discussion and by agreement of the counsel present there was inserted in the said order of sale such a provision as he asked, in language drafted by Mr. Kenna, approved by affiant and assented to by the purchasers present, that clause being in the words following, to-wit: 'including also any taxes which may finally be adjudged to be a lien upon the property and sold under the decree aforesaid.'" (Pr. Tr. pp. 125 to 126, also Appellant's Reply Brief pages 6 to 9.)

From this affidavit it clearly appears, that the taxes *then levied* were the only taxes brought to the attention of the Court, and concerning which its action was invoked.

At the same time and at the same hearing Mr. Clancy made another affidavit, which was considered, and which contained among others the following statements (the italics are ours):

"Affiant denies, as alleged by said Sterry in his said affidavit, that in 1892 the assessor of Valencia county assessed the right of way of the said railroad company and its station grounds in said county at the aggregate sum of $327,103; but avers that the said assessor, on the assessment roll for 1892 did assess the "total value of right of way" at the amount aforesaid, and that the said assessment was based upon a return made by the said Sterry on the 19th day of April, 1892, in which he stated the full value of the said right of way and of the superstructure thereon, composing the road bed, track and railroad of said company, together with the telegraph line erected on said right of way, at the sum aforesaid; and that the said assessor assessed the grounds for station buildings and for other purposes together with the improvements thereon, at the sum of $11,782 and that such assessment was based upon the same return made by the said Sterry. * * * *

Affiant admits, as is shown by the records of this Court, that on the 10th day of June, 1897, the intervening petition in this proceeding was filed; and affiant states in connection herewith, that the additional assessments set up and referred to in said intervening petition, copies of which were filed therewith as parts thereof, *were made by the collector of Valencia county on or about the 7th day of June,* 1897; that the said additional assessments were made by the said collector because there had been no assessment made for either of the years from 1892 to 1896, of the property described and set forth in the said additional assessments, *especially as to the improvements upon the land embraced within the limits of the right of way of the railroad company,* the previous assessments having been in terms only *of the 'total value of the right of way;'* and their validity having been disputed on that ground as well as others, by the said Sterry; and also for the purpose of *discriminating* between *the improvements on the right of way* where the same runs over what was public domain of the United States when the right of way was granted and the improvements upon the right of way where it runs over land which was held in private ownership at the time of said grant.

Affiant further says that at the time of the making of said additional assessments, he directed the said collector to give notice of the same to the said Sterry and to the receiver of the railroad company, and also as he now recollects to the counsel of the United States Trust Company, and he has been assured by the said collector that the said notices were mailed as directed by affiant."

(Pr. Tr. pp. 117 to 125.)

Upon this hearing, after a full discussion, the Court entered its decree of confirmation, containing, among the provisions as to claims that the purchasers should pay, in addition to the purchase price bid, a provision that they should also pay—

"any taxes which may finally be adjudged to be a lien

upon the property sold under the decree aforesaid." (Pr. Tr. p. 47.)

While this language was broad enough to include taxes, that might be levied any year after the sale, it necessarily was limited to embrace *only such taxes* as were at that time actually in existence upon the records of the county, and at that time a lien on the property prior to the mortgage that was foreclosed; being the taxes, that were under discussion before the Court, and not taxes levied for the *first time* a month and three days afterwards.

This Court, in determining the scope of this clause in the decree, considered (as it should) one of the affidavits, filed by Mr. Clancy, as shown by the following excerpt from its statement of the facts:

> "According to an affidavit filed in the case this clause was entered at the suggestion of counsel for the Territory, and upon notice in open court of his intention to present a claim for the taxes hereinafter referred to."

All the matters presented by either affidavit, at the hearing of the motion to dismiss, were proper to be considered by the Court below, and this Court, for the purpose of showing that the broad language of the final decree, with reference to "any taxes," was limited to certain taxes, and was not intended to apply to future taxes, as will be seen from the authorities.

This Court, speaking through Chief Justice Waite, in the case of Barnes v. C. M. & St. P. Ry. Co. (122 U. S. 1), said, in reference to the construction of decrees:

> "Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construc-

tion so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. Graham v. R. R. Co., 70 U. S. 3 Wall. 704 (18: 247)."

See also:

S. M. etc. Co. v. St. Paul, etc. R. R. Co., 12 U. S. App. 320.

Humphries v. Third Nat'l Bank, 43 U. S. App. 698.

As stated in section 123 of Black on Judgments:

"Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the Court, reference may be had to the pleadings and the other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled and its intended significance made apparent, the judgment will be upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms."

It must be conceded that Mr. Clancy, was perfectly familiar with the terms and conditions of the final decree, in foreclosure, as he stated that he was afraid they were not broad enough for his purpose, and of the terms and conditions of the decree of confirmation, which he helped to shape. While the entire matter was fresh in the minds of all parties, a month and three days later, Mr. Clancy, sincerely believing in his theory, that the superstructure of the railroad, upon its right of way, was separate and distinct, from the right of way itself, and that the decision of the Territorial Supreme Court holding adversely would be reversed by this Court, rightly assumed *upon such theory*, that such superstructure, had not been assessed for the years 1892 to 1896, not being included in the assessments of the right of way, which

tween the *sale* of the property and the *delivery* of it to the purchasers; after the delivery of the property, when sold, claims were to be presented in accordance with a notice to be published by the receiver; no provision was made in this decree, or the decree of confirmation, for the presentation of claims to the receiver, or the Court, for distribution of any of the proceeds arising from the sale.

The property ordered to be sold, under this decree, was sold on the 3rd day of May, 1897, a little over a year, after the entry of the final decree; on the 4th day of May, 1897, the sale having been reported by the Special Master, an application for a confirmation of the sale was made to the Court. At this hearing, there were present, not only the appellants, and other parties, but also the appellee, by its solicitor, Mr. Clancy, who was present, for the express purpose of having inserted in the decree of confirmation, a provision covering taxes which were *then* in dispute, between the receiver and Valencia and Bernalillo counties. (Pr. Tr. pp. 44 to 51, 125 to 127.)

At this point, we desire to call the attention of the Court to certain facts, which it certainly overlooked, then existing within the knowledge of the District Court, and of each of the parties attending this hearing for confirmation, shown by the affidavits filed and considered upon the hearing of the motion to dismiss, together with the record.

From 1892 to 1896, inclusive, there had been levied, in Bernalillo and Valencia counties, New Mexico, (the only two counties in that Territory through which the road ran) each year, taxes upon an assessment, by the proper officers,

of the entire "right of way" of the Atlantic & Pacific Railroad, as it ran through each of these counties. These taxes, for 1892 and 1893, the Railroad Company had refused to pay, on the ground that the entire right of way was exempt from taxation, under the Act of Congress creating it; for the subsequent years the receiver had refused to pay for the same reason. Previous to the entry of the final decree a suit had been brought against the receiver, in the name of the Territory, to enforce the collection of the taxes in Bernalillo county, and on the hearing in the District Court, that Court had held, that the superstructure placed on the right of way, was not within the exemption, and was subject to taxation. Upon an appeal from this decision by the appellant, in this case, the Supreme Court of the Territory had held, that the superstructure was a part of the right of way, and that, under the Act of Congress, the entire right of way was exempt, including such superstructure. This case was decided by the territorial Supreme Court on December 18, 1896. Subsequently a supplemental case, was brought by the Territory, to recover taxes not embraced in the first case, and that was decided by the lower Court, in accordance with the decision of the Supreme Court of the Territory, and it was also appealed to the Supreme Court of the Territory by the appellants in this case; on August 20, 1897, the Supreme Court of the Territory affirmed that decision. Each of these decisions, made by the Territorial Supreme Court, were appealed by the Territory to this Court; (where they were subsequently affirmed, 172 U. S. 171); each of these appeals were pending, unheard, and

undetermined, when this hearing for a confirmation of the sale took place.

At the time of this hearing the taxes in controversy, set out in the intervening petition, were, not only *not levied, or in existence*, but were not dreamed of, by either Court, or counsel, as such assessments, and taxes, were for the first time made and levied on June 7th, following, a month and three days later.

At the time of the hearing for confirmation, appellee, by its solicitor then present, stated to the Court:

> That arrangements had been made for his employment by the counties of Bernalillo and Valencia, under authority of an act of the Legislative Assembly of 1897, for the purpose of prosecuting claims against the property sold *for taxes which had been levied for four or five years in said counties*, the validity of which was in dispute, the railroad authorities claiming that the congressional exemption set out in the second section of the Act of Congress of 1866, etc., extended to the property upon which the taxes had been levied.

To more fully show what was then before the Court in this matter we quote from the affidavits of Mr. Clancy, showing exactly what took place, at the time of the hearing of the application to confirm, as claimed by the appellee (the italics are ours):

> "F. W. Clancy, being duly sworn, on his oath says, that since the making of the previous affidavit in this cause he has been served with a copy of an amended motion to dismiss the intervening petition herein, which sets up an additional ground for such motion, said ground being that which is set forth in the third paragraph of said amended motion. Affiant states that at the time of the presentation to this Court of the report of the foreclosure sale in this cause and the asking of

a confirmation of said sale, he attended before the Court for the purpose of having inserted in the order of confirmation a provision that the sale was made subject to the payment by the purchasers of their successors or assigns *of any unpaid taxes which might be adjudged to be a lien upon the property sold;* that at said time there were present Mr. Aldace F. Walker and Mr. Victor Morawetz two of the purchasers at said sale, and perhaps Mr. R. Sommers Hayes, the third purchaser, but of this affiant is not now certain; there were also present Mr. C. N. Sterry and Mr. E. D. Kenna, who was and is, as affiant understands, the principal law officer of the whole Santa Fe system of railroads; that at *said time and place* affiant *stated* that arrangements had been made for his employment by the counties of Bernalillo and Valencia, under authority of an act of the Legislative Assembly of 1897, *for the purpose of prosecuting claims against the property sold for taxes which had been levied for four or five years in said counties*, the validity of which was in dispute, the railroad authorities claiming that the Congressional exemption set out in the second section of the act of Congress of 1866, incorporating the Atlantic and Pacific Railroad Company, extended to the property upon which the taxes had been levied; that a long discussion ensued, in the course of which affiant distinctly recollects that it was urged by some of the gentlemen present that the decree of foreclosure had said nothing on the subject of unpaid taxes and that it was not fair to the purchasers to saddle them with any additional liability in the order of confirmation, to which affiant replied in substance that if the purchasers had been misled or deceived by the decree of foreclosure it was not too late for them to recede from their purchase and refuse to take the property if additional and unexpected burdens were imposed; that in answer to a suggestion made as affiant now recollects, by Mr. Kenna, *that if the taxes were a lien on the property that lien could not be divested by the sale of the property*, affiant answered in substance that in his opinion *this was true*, but he desired to have inserted in the order of confirmation such a provision as he asked so that it would be impossible for the purchasers at any future time to set

he admitted, had been properly made, notwithstanding the fact that such assessments under the laws of New Mexico carried with them all improvements placed upon the right of way as being part of it (See Sec. 2807, Laws of New Mexico, page 156 of our Brief).

(That such superstructure was a part of the right of way itself was subsequently determined by this Court in the Bernalillo county cases).

Acting solely upon this theory, Mr. Clancy, on the 7th of June, a month and three days, after the decree of confirmation was entered, and some days after the deed was actually executed, from the Master to the purchasers, procured the collector of Valencia county, to assess the superstructure, over the entire right of way in Valencia county, as an independent piece of property, upon his theory, that it had escaped assessment and taxation, during those years by reason of not being covered by the assessment and taxation of the right of way. The entire matter being fresh, as stated, in the minds of all parties, Mr. Clancy perfectly understood, that the decree of confirmation did not, and was not intended, to cover any such taxes, and that such claim could not be enforced against the purchasers of the property, having come into existence over a month after the sale and its confirmation. He knew that so far as either of the decrees, had imposed upon the purchasers, the burden of paying any sums in addition, to the purchase price, to cover claims mentioned in these decrees, that the decrees provided, the specific and only way, in which such claims could be presented to, and enforced against the purchasers, by an intervention in that suit, which in any

proper case could be had *as a matter of right* without leave from the Court, in the manner provided for in the decree; he knew that prior to the delivery of the property to the purchasrs, if he desired to hold the purchasers, he should present any such claims to them, and upon their refusal, by giving to them 15 days notice of his intention to file such claims in this cause, he could file the same, as a matter of right, without leave of Court. He knew that the property had been sold, and the names of the purchasers who bought, yet when he came to instruct the collector, as to whom he should notify, of the fact that he had made these additional assessments, in order that such party might appeal, under the provisions of section 4056 (*post*), he instructed him (according to his own affidavit) only to notify the receiver and his solicitor, and the United States Trust Company, omitting from such instructions the names of the purchasers, whom he had no thought of molesting concerning these particular taxes, and whom he knew would have no reason to appeal. Mr. Clancy also knew, that no provisions had been made covering the payment by the receiver, out of the funds received upon the sale, of any claims, of the character of those held by him, and that, to enforce such claims against such funds, he would have to procure an order of the Court to intervene by a proceeding directly against the receiver, and the only other party interested in the funds received from the sale, to wit, the United States Trust Company. Knowing these things, the appellee, ignoring the provisions of the decree, with reference to enforcing claims against the purchasers, presented the intervening petition in controversy to the Judge at Chambers, on the 10th

day of June, 1897, and procured express leave to file it. This is shown by an order entered at that time (the italics are ours):

> "Upon reading and filing the intervening petition of the Territory of New Mexico, and after hearing F. W. Clancy, Esq., solicitor for the said intervening petitioner, *it is ordered by the court* that the said Territory of New Mexico be and *hereby is given leave to intervene herein* and that *the parties hereto who have appeared herein* are required to show cause before the judge of this court at the court house, in the county of Bernalillo, on the 15th day of June, 1897, at ten o'clock in the forenoon of said day, why the prayer of said petitioner should not be granted, service of copies of said petition and of this order to be made not later than the 10th of June, 1897, upon the solicitor for complainant, the solicitor for the Mercantile Trust Company and the solicitor for the said receiver, such service to be made in accordance with the usual practice of this court.
>
> N. C. COLLIER, *Judge.*"

(Pr. tr. p. 57.)

By such order, appellee was given leave, to intervene, in the cause for the purpose of presenting a claim, not against the purchasers, but against the receiver, and the funds in his hands, for taxes which were levied only three days prior to the obtaining of the order, but a month and three days after the sale of the property. The appellee, and the Judge having all of these matters then fresh in mind, and understanding, that this intervening petition, was not to enforce any provision of the decree, had the order provide for a service of it, not upon the purchasers, who were then solely interested, but upon the parties who had theretofore appeared in the cause, and who were interested only in the distribution of the funds, and these parties, and these parties

only, were required to show cause why the order should not be granted, and were required to do this in five days, instead of fifteen days, which was given by the decree, when a claim was to be filed against the purchasers.

In this connection it should be remembered that the final decree provided that claims sought to be enforced against the purchasers, and the property, *after the sale and prior* to the *delivery* of the *possession of* the *property* to the purchasers were to be presented to the purchasers, and upon their refusal to pay, then upon a *fifteen* days' notice to the purchasers, the party having such claims could *as a matter of right, without leave of Court,* file his petition in the Court in this cause for the purpose of having the claims adjudicated. *After the delivery of the property,* then the claimants were to present their claims in accordance with the notice to be published by the receiver.

This petition was filed on the 10th of June, 1897 (Pr. tr. p. 50), the property delivered to the purchasers, or rather to their assignee, on the 22nd of June, 1897 (Pr. tr. p. 115), and as the notice to creditors was not published until April 3, 1899 (Pr. tr. p. 105), it is made still more apparent, that the petition, was not attempted to be filed for the purpose of enforcing those provisions of the decree which appear on page 40 of the record; neither was the petition filed for the purpose of presenting claims under the notice to creditors, published more than a year afterwards. It seems to us from the facts above stated that there cannot be the slightest question but that the taxes mentioned in the decree of confirmation were the taxes then standing on the records of the county as an apparent lien upon the property sold,

and not the taxes that were then unthought of and subsequently levied upon assessments that were as yet not made. That this Court in its decision was entirely misled in respect to this matter (if our contention be correct) is clear from its statement of facts.

In the statement of facts preceding the opinion it is said (the italics are ours):

> "The order of confirmation contained substantially the same provisions respecting payment of obligations as the decree, and added 'including also any taxes which may finally be adjudged to be a lien upon the property sold under the decree aforesaid.' According to an affidavit filed in the case this clause was entered *at the suggestion of counsel for the Territory, and upon notice in open court of his intention to present a claim for the taxes hereinafter referred to.*"

In that portion of the opinion referring to this order of confirmation, and evidently based on this statement, the Court uses the following language (the italics are ours):

> "Neither can the Santa Fe Company claim that it was misled in any way as to its liability for *these taxes,* for not only by the terms of the decree was the sale to be made subject to any indebtedness that might subsequently be charged against the property prior in lien to that of the mortgages foreclosed, but also on the confirmation of the sale and before it took title from the purchasers at such sale the order specifically included within the obligations which must be assumed *any taxes* which might 'finally be adjudged to be a lien upon the property.'"

A portion of section 4057 of the Revised Statutes of New Mexico (2849 in Appendix of Brief) reads as follows (the italics are ours):

> "Sec. 4057. Every tax levied according to the provisions of this act shall have the force and effect of a

judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon *from the date of the levy thereof* * *"

In our brief, filed in October last, we attempted to impress upon the Court the fact that these taxes in controversy under this statute, were for the first time a lien upon the property sold on the 7th of June, after its sale, confirmation and conveyance, and hence not taxes mentioned in the decree (Brief, pp. 69 to 72), citing:

Lyon v. Alley, 130 U. S. 177.
Cooley on Taxation (2nd ed.), pages 305, 352, 353.
Miller v. Anderson et al., 1 S. Dak. 539.
Creighton v. Manson, 27 Cal. 614.
State v. Newark, 42 N. J. L. 38.
Howell v. Essex Co., 32 N. J. Eq., 672.
Garretson v. Schofield, 44 Iowa 37.
Otoe Co. v. Mathews, 18 Neb. 466.
Meyer v. Burritt, 60 Conn. 117.
New England L. & T. Co. v. Young, 81 Iowa 732.
Philadelphia v. Greble, 38 Pa. St. 339.
Board of Education v. Old Dominion Iron etc. Co., 18 West Va. 441.
Kentucky Central R. R. Co. v. Commonwealth, 92 Ky. 64.
Tousey v. Post, 91 Mich. 631.
Anderson v. State, 23 Miss. 459.

In conclusion upon this subject, we desire to say that under the authorities cited in our brief on pages 50 to 55, inclusive, the discharge of the receiver, ended the right to further proceed, with this intervening petition, it not being

filed to enforce the terms of the decree concerning claims to be paid by the purchaser, but to enforce claims against the receiver as such officer and the funds under his control. The cases of N. Y. & W. U. Tel. Co. *in re* v. Jewett, 115 N. Y. 166, and Texas and Pacific Ry. Co. v. Watson et al., 24 S. W. Rep. 952, are precisely in point. In addition to those cases, see decision of U. S. Circuit Court of Appeals, 9th Circuit, in the case of Thompson v. Northern Pacific Ry. Co., 93 Fed. 384; also, Sloan v. Central Iowa Ry. Co., 62 Iowa 728, and the other cases cited on pages 50 to 55 of our Brief.

II.

In passing upon the motion to dismiss, and the plea in abatement, the Court in its opinion, says:

> "The filing of the intervening petition and the final adjudication thereon were in time. It is true the petition was not filed until after the sale had been confirmed and the master's deed executed, and that by the decree of confirmation the receiver was directed to then turn over the property to the purchasers. It may be also conceded as generally true that a retention by a receiver, after the time for the delivery of the property in his hands, is as agent of the purchasers. (*Very* v. *Watkins*, 23 How. 469, 474.) But the filing of the petition, as well as the mandate from this court, was within the time expressly named in the decree, as follows:
>
> > 'Any such claim for indebtedness, obligations or liabilities which shall not have been presented in writing to the receiver or filed with the clerk of this Court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the receiver of a notice to the holders of such claims to present the same for allowance.'
>
> Indeed, the petition was filed while the prop-

erty was still in the hands of the receiver, and that would seem to bring the action of the intervenor within the terms of the first clause of the quotation just made. At any rate, everything in the district court, even its final adjudication, was before October 23, 1899, the time fixed in the notice for the cutting off of claims against the property given at the instance of the grantee of the purchasers, to wit, the Santa Fe Pacific Railroad Company."

The Court, in making this statement, labored under an evident misapprehension of our position, as we did not intend, either in our brief, or oral argument to say that the intervening petition was not filed in time. What we did intend to say, was: that no notice of these claims was ever given to the purchasers, or their assignee, prior to its filing, and that neither the purchasers, or their assignee, ever refused any payment of any claim presented by the intervening petition; that consequently it could not be sustained, as an intervening petition filed under the terms of the decree. Upon the hearing of the motion to dismiss, there was presented in support of this point an affidavit of Mr. Sterry, as follows:

"C. N. Sterry, being first duly sworn, deposes and says: That the taxes claimed to be due by the intervening petition herein was never presented to, or the payment thereof demanded from the purchasers of the property sold under the decree in this cause, or their assigns, and that neither the purchasers nor their assigns have ever refused any payment of such taxes or any part thereof upon any demand or claim for the same upon them, or either of them by the Territory of New Mexico. That no notice was ever given to the purchasers, or their assigns that any intervening petition would be filed in this cause for or on behalf of any such taxes prior to the filing of the same, except that F. W. Clancy, at the time the confirmation of the sale

was pending, notified the purchasers, their solicitor and the Court, that he had been employed by Valencia County to collect taxes claimed to be due, and that he wished the decree of confirmation of the sale of the property so formed that if he obtained a valid judgment for such taxes it would be a lien upon the property sold in the hands of the purchasers. That the possession of the property sold under the decree was delivered by the receiver to the assigns of the purchasers, the Santa Fe Pacific Railroad Company on July 1st, 1897. And further affiant saith not." (Pr. Tr. p. 116.)

In our brief, and argument, we intended and attempted, to say to the Court, that so far as the purchasers, and their assignee, were concerned, this decree created a contract between them and the Court, by which the method of presenting claims, which they were to pay, as part of the purchase price, was definitely fixed, and regulated, and that such method could not be changed, without the consent of the purchasers themselves. (See argument in our brief, page 46 and commencing 2nd paragraph, p. 58, and ending 5th paragraph, p. 65).

We cited in support of this proposition the following authorities:

Kneeland v. American Loan Co., 136 U. S. 89.

Davis v. Mercantile Trust Co., 152 U. S. 594.

Central Trust Co. *et al.* v. Wabash, St. L. & P. R. R. Co. *et al.*, 30 Fed. 332.

Fidelity Ins. T. & S. Co. v. Norfolk & W. R. R. Co., 88 Fed. 820.

C. & O. R. R. Co. v. McCammon (C. C. A. 7th Cir.), 61 Fed. 774.

Farmers' Loan & Trust Co. v. Central R. of Iowa, 7 Fed. 537.

Davis v. Duncan, 19 Fed. 477.
Houston & T. C. R. R. Co. v. Crawford, 88 Tex. 277.
Hicks v. Railroad Co., 62 Tex. 41.
Beach, Rec., Par. 735.
C. T. Co. v. St. L. A. & T. R. R. Co., 59 Fed. 385.

We respectfully submit that the portion of the decree, quoted in the above excerpt, from the opinion of the Court, has no application to any proposition that was before the Court. This intervening petition, was either filed under the order of the Court hereinabove quoted, or else attempted to be filed under the provisions of the final decree, and was not attempted to be filed under any notice to creditors made after the delivery of the property; if the intervening petition was attempted to be filed under the terms of the decree, the Territory failed to bring itself within the requirements of such decree, and therefore the petition should have been dismissed, on the ground that neither the Court, or the Territory, could change the terms of the decree, without the consent of the purchasers; if in such case it is a fact, that the purchasers were notified of the claims for these taxes, (as assumed by this Court), at the time of the confirmation of the sale (a proposition which we strenuously deny), such notification could not take the place of the express provisions of the decree; if filed under the order of the court and not under decree then it should have been dismissed after the discharge of the receiver.

SECOND.

WE RESPECTFULLY SUBMIT THAT THIS COURT IN DETERMINING THAT ITS FORMER DECISION, WAS A CONCLUSIVE ADJUDICATION OF THE RIGHT OF THE COLLECTOR, TO MAKE THE ASSESSMENTS, AND LEVIES, SET OUT IN THE INTERVENING PETITION, MISUNDERSTOOD OR OVERLOOKED THE RECORD BEFORE IT, UPON THE FORMER HEARING, AND THE RECORD BEFORE IT UPON THIS HEARING.

The first paragraph of the intervening petition filed in this cause stated the jurisdictional facts, which gave to the collector of Valencia County his only possible authority to make the assessments, and levies, in controversy, which are in the subsequent paragraphs of the petition fully set out. For the purpose of convenience, we here copy this first paragraph, of the intervening petition (the italics are ours):

> "Certain property of the Atlantic & Pacific Railroad Company was *omitted in the assessment of taxable property within the county of Valencia in the Territory of New Mexico for a series of years beginning with the year* 1892 *and ending with the year* 1896, *and was not put upon the assessor's books for said years, and the assessor in said county having failed to list the same or place it upon his roll before it was returned to the county commissioners,* the collector of taxes in said county, after the tax-list for the year 1896 had been delivered to him, proceeded to list, value and assess such property in the manner that the assessor might have done, and to enter such assessment in his tax-list and to assess taxes thereon as hereinafter in detail more fully set forth."

(See p. 30 Tr. filed Sept. 20, 1897; p. 51 Tr. filed Oct. 27, 1900.)

The allegations contained in this first paragraph were not only *material,* but were *absolutely necessary,* in order to show, that the collector of Valencia County, had authority to enter upon the tax roll of 1896 the assessments, and levies, alleged in the intervening petition to have been made and entered by him for the years 1892 to 1896 inclusive. This will be seen by reading the statutes, which for convenience we here copy, being sections 4055 and 4056 of the Compiled Laws of New Mexico, Compilation of 1897:

"Sec. 4055. If by any means any property shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same when discovered shall be listed by the assessor and placed upon his roll before the same is returned to the board of county commissioners, with all arrearages of taxes which should have been assessed and paid in former years charged thereon, or in case of failure of the assessor, the same shall be assessed by the collector in the manner provided in the next section.

Sec. 4056. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate, or any personal property then in his county are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list following the entries made by the clerk (and such entries shall be designated as 'additional assessments'), and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the board of county commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him."

To this intervening petition appellants, on the 30th of September, 1899, (having by leave of court withdrawn those previously filed on June 23, 1897), filed in the District Court, their pleas in bar, setting out in substance, among others, the following facts:

That in each of the years 1892 to 1896, inclusive, the *identical* property, alleged in the intervening petition, to have been assessed by the collector, was under another, and broader description, assessed by the County Assessor, upon the several assessment rolls, for each of those years, at the time required by law, in each year; that the taxes levied in each of said years, in Valencia County, were duly and legally extended, against each of such assessments, at the proper time in each year, so that the property described in the intervening petition as property which had escaped assessment for each of those years, was property which had been *actually* listed upon the assessment rolls, for each year, and duly assessed by the assessor, before the rolls were returned to the County Commissioners, and against which the taxes levied were duly extended, and not property, which had been omitted from such rolls in each of said years, or in any one of them, as alleged in the intervening petition. That the taxes levied against each of such assessments, were still standing on the tax rolls, unpaid and uncancelled. That the collector in entering said property upon the tax rolls of 1896, for assessment and levy, entered it, upon such tax rolls on June 7, 1897, while the assessment roll, of that county, for the year 1897, was still in the assessor's hands. (Pr. Tr. pp. 151 to 212, inclusive.) See our Brief, filed in October, pp. 90 to 100.

The facts thus pleaded, disclosed upon their face that the collector, had no jurisdiction under the statutes quoted to make either of the assessments, or levies, set out in the intervening petition, and hence each of such assessments, and levies, were void, as the superstructure so assessed, being determined by this court, to be a part of the right of way itself, was necessarily, under the provisions of section 2807 of the Laws of New Mexico, (see appendix of our brief), included in the assessments made of the right of way by the county assessors.

The pleas in bar stating these facts, were set down for argument, and upon argument the facts referred to (their truth being admitted) were held, insufficient in law, to constitute any defense, to the assessments and levies, set out in the intervening petition, or to show, that the collector, in making the assessments referred to, and extending the levies of taxes thereto, acted without jurisdiction. (Pr. Tr. pp. 288 to 289.)

Upon appeal to the Supreme Court of the Territory of New Mexico this ruling was affirmed (Pr. Tr. p. 316, 322).

If these facts constituted a bar (as was, and is claimed by us) to the right of recovery on the part of the intervenor, they had to be set out in pleas, as they could not have been stated in an answer.

Farley v. Kittson, 120 U. S. 303.

U. S. v. California & O. Land Co., 148 U. S. 31.

Upon the hearing of this appeal from the decision of the Supreme Court of the Territory by this Court, one of the most important propositions presented by the appellants, in their brief, and upon oral argument, was in substance:

That the collector of Valencia County acted without any jurisdiction, in making the assessments of the property assessed by him, for the years 1892 to 1896, upon the tax rolls of 1896, and acted without jurisdiction, in extending against each of such assessments the levy of taxes for each of the years and therefore no recovery could be had upon the intervening petition. (See appellants' brief, pages 85 to 100; reply brief, pages 17 to 20.) This proposition was based entirely upon the facts stated in these pleas which by the lower Courts had been held insufficient in law. In deciding this case, on January 6, 1902, this Court refused, to pass upon the proposition above stated, or any of the questions involved in it, for the following reasons, stated in the opinion as follows (the italics are ours):

> "The District Court dismissed the intervening petition on the ground that it presented no claim against the property or the parties. The reversal by this Court of such order is an adjudication that upon the face of the petition a valid claim was presented, and is conclusive of such *prima facie* validity, not merely against objections which were in fact made but also against those which might have been made. (*Cromwell v. County of Sac.*, 94 U. S. 351, 352; *Nesbit v. Riverside Independent District*, 144 U. S. 610, 618.) We start in this inquiry then with the adjudicated fact that upon the face of the intervening petition was presented a valid claim for the taxes therein specified. * * * There was no invalidity in the fact of additional assessments. Indeed, the claim in the petition was wholly for taxes based upon additional assessments for prior years, and when this Court adjudged that that petition upon its face showed a tax claim against the property, *it was an adjudication in favor of the validity of such additional assessments.*"

In other words, this Court refused to consider this proposition, because it believed, that in the former appeal it either had, or might have considered and disposed of it.

These reasons make it clear, to our mind, that the learned Justice, delivering the opinion, and this Court, misunderstood, not only the present record, and our argument upon it, (so far as the proposition above stated is concerned,) but also the record, that was before this Court, at the time of its former decision, and the possible questions presented by it for the determination of this Court; that through such misunderstanding appellants have suffered an injustice that otherwise would not have occurred. We therefore desire to call attention, to each of these records so far as this matter is concerned, as follows:

The intervening petition in this case, was filed in the District Court on the 10th day of June, 1897, and on the 23rd day of the same month, the appellants filed in that Court, pleas in bar to this intervening petition, and to each claim for taxes for each year. These pleas in bar, in substance set out the same facts as were alleged in the pleas in bar, above referred to (filed on the 30th of September, 1899) except that at that time, it not being known that the collector, entered these assessments on the tax rolls of 1896, in the year 1897, no facts concerning that matter were set out in those former pleas. (See pages 32 to 77 of original Tr. filed Sept. 20, 1897; present Tr. pp. 58 to 103.)

These five pleas, were set down for argument, and while argued to the District Court, the District Court refused to entertain, or consider them, for the reasons stated in its order, which for convenience we here copy:

"The said matter coming on to be heard upon the question of the sufficiency of the joint and several pleas of the United States Trust Company and Charles W. Smith, receiver of the property of the Atlantic & Pacific Railroad Company, to the said intervening petition, for the collection of taxes alleged to be due in Valencia County, after hearing F. W. Clancy for the said intervening petitioner and Karl A. Snyder, Esq., on behalf of the said Trust Company and the said receiver, the Court, being sufficiently advised in the premises, finds that it is neither necessary nor proper to pass upon the question of the sufficiency of said pleas for the reason that the said intervening petition and matters and things therein set up fall within the decision of the Supreme Court of New Mexico in the matter of a like intervening petition in this cause, rendered on the 18th of December, 1896, and are therefore not sufficient to entitle the said intervening petitioner to the relief sought by its petition, and that this petition ought to be dismissed.

It is therefore ordered, adjudged and decreed, that the said intervening petition and the same hereby is dismissed. And thereupon the said intervening petitioner prays the Court for an appeal to the Supreme Court of the Territory of New Mexico from the order and decree of this Court. It is therefore ordered by the Court that the said intervening petitioner be and it hereby is allowed an appeal from the said order and decree of this Court to the Supreme Court of the Territory of New Mexico.

(Signed) N. C. COLLIER, *Judge.*"

(Original Tr. pp. 77 to 78; present Tr. p. 103.)

This order of the District Court was affirmed by the Supreme Court of the Territory (Original Tr. filed Sept. 20, 1897, p. 87).

The record which came before this Court, upon the former hearing, consisted of the bill of foreclosure, the order appointing the receiver, the intervening petition, the five pleas

made to it, the order of the Court refusing to consider the pleas, and dismissing the intervening petition, and the order of the Supreme Court of the Territory affirming the order of the District Court (See original transcript, also our brief, p. 72).

After the motion to dismiss the intervening petition was heard and determined (Tr. pp. 107 to 127), the District Court permitted the withdrawal of the pleas, above referred to (which were filed to the intervening petition on the 23rd day of June, 1897), and permitted the plea in abatement to be filed in the place thereof, which was overruled (Tr. pp. 129-130). Then a demurrer was filed, which was heard and overruled (Tr. pp. 130 to 151). And then the pleas in bar filed on the 30th of September, 1899, were filed (Tr. pp. 150 to 212).

It therefore appears, that appellants, at the very first opportunity, presented to the District Court, by proper pleas the facts disclosing, that the jurisdictional facts, set forth in the first paragraph of the intervening plea, (for the purpose of showing the authority of the collector to act), were untrue, and asked the Court to so determine. The District Court refused, after hearing the argument, to pass upon that question, or in any way determine it. Hence when the case was formerly here, and passed upon by this Court, (172 U. S. 171; 174 U. S. 545) there was nothing in the record, that this Court could consider, except the question of the sufficiency of the facts stated in the intervening petition, to constitute valid claims against the receiver. The facts alleged in the five pleas, or either of them, could not, under any possibility, have been presented to, or con-

sidered by this Court. This Court, on that hearing, was bound to hold, that the facts stated, in the first paragraph of the intervening petition, above quoted, were for such hearing true, and that, being true, under the statutes above set out, the collector had the right to make the assessments, and levies, that he did make, if the property, or any of it, was not exempt from taxation, and if the assessments made were sufficient to show a compliance with the statute. The appellants were unable before this Court, at that time, through no fault on their part, to present any question, as to the truth, of the matters (jurisdictional or otherwise), alleged in the intervening petition, and hence this Court, at that time, holding, as it did, that certain of the assessments, were upon property not exempt, and sufficient in description, could not have done otherwise, than to hold, that *prima facie* under the laws of the Territory, the collector had jurisdiction to do the acts alleged to have been done by him. At that time, and on that hearing, this Court would not for a moment, have considered (and did not have the right jurisdiction to consider) any matters alleged in either, or all of the five pleas, in avoidance of the facts stated, in the first paragraph of the intervening petition. In truth it could not possibly have entertained any question, as to the truth of any one of the jurisdictional facts, stated in the first paragraph of the intervening petition.

It must be conceded, therefore, that if, under the former record, at the former hearing, this Court could not have heard any objection to the truth of the matters, set out in that petition, the appellants have now the right to

be heard upon that question, it having, upon proper presentation to the Supreme Court of the Territory, been determined adversely to appellants.

It is barely possible that this Court, in its last decision, (as we believe it actually did in its first) assumed, that the "additional assessments," alleged in the intervening petition, meant assessments additional to assessments of the same property already made, and not (as provided by the statute) "additional assessments" upon the rolls, of property *not* assessed. This would seem possible true, from the following excerpt from the opinion:

> "There was no invalidity in the fact of additional assessments. Indeed the claim in the petition was wholly for taxes based upon additional assessments for prior years."

If the Court meant to say in effect; that its former adjudication determined that the collector had the power to make assessments of any property in addition to assessments which had already been made upon such property, then the Court was wrong, as no such question was possibly before it at the former hearing, or at this hearing. If, on the other hand, the Court simply intended to say that in its former decision it determined that the collector had the right under the statute of New Mexico quoted to make additional assessments upon the tax roll of property entirely omitted from the assessment rolls, when the other jurisdictional facts required by the statute existed, then in such case, as the statute expressly authorized such action, we never have intended at any time to question the right of the collector so to do, if the jurisdictional facts stated in the first paragraph of the intervening petition had been true, instead of untrue.

THIRD.

THE COURT OVERLOOKED THE FACT THAT THE PLEA IN BAR DISCLOSED, THAT THE TAXES IN CONTROVERSY CONSTITUTED DOUBLE TAXATION; THAT THE IDENTICAL PROPERTY HAD THE IDENTICAL TAXES LEVIED AGAINST ASSESSMENTS OF SUCH PROPERTY MADE BY THE COUNTY ASSESSOR AT THE TIME THE COLLECTOR ASSESSED AND LEVIED TAXES UPON HIS ASSESSMENT; THAT IF THE PRESENT ASSESSMENTS AND LEVIES, ARE UPHELD, THE ORIGINAL ASSESSMENTS, AND LEVIES, MADE BY THE PROPER OFFICERS AT THE PROPER TIME, ARE PERFECTLY VALID, HENCE THE SAME TAXES WERE LEVIED TWICE, UPON THE SAME PROPERTY, AND THE TAXES IN CONTROVERSY CONSTITUTED THE SECOND LEVY THEREON.

The facts stated in the pleas in respect to this matter were, in substance, as follows:

That when these additional assessments were made by the collector, there were already taxes levied, in each year, upon assessments, that were just as valid, so far as the description was concerned, as the assessments under consideration, and which included the property assessed by the collector; that these taxes were unpaid, and uncancelled, and so remain to-day upon the books of the county; that if the assessments under consideration were valid, then the assessments that were already upon the rolls of the county were valid; that, under the facts stated, there was double taxation of the same property; that is to say: The same identical taxes were levied for each year twice, upon the same identical property. To determine that the taxes claimed in the intervening petition were valid, and should be paid, was to determine, at the same

time, that the same taxes levied by the proper officers were valid, and should be paid.

The Supreme Court of the Territory answered this proposition, by saying that the assessments made by the assessor, during these years, were void, because the assessment was of ninety-three miles of the right of way in the aggregate, while but fifty-five miles of right of way was actually taxable, the balance being exempt, yet in the same breath, said, that an assessment of sixty miles of such right of way in the aggregate, when only fifty-five miles thereof was upon property not exempt, was valid. This holding of the territorial Court presents an inconsistency, that ought not to be approved by a Court of this character and standing.

The inequity of the holding by the lower Courts that the facts showing these things alleged in the pleas in bar, were insufficient, in law, to defeat the claims presented, would have been perfectly apparent to this Court, if it had fully understood the questions presented by these pleas in bar, and the ruling thereon by the lower Courts. The proposition, that there were at the time of the levies by the collector the same taxes, levied upon the same identical property, unpaid and still in existence, could not possibly have been urged, or presented to this Court, upon the first hearing of this cause.

FOURTH.

If, as held by this Court in its decision, the Santa Fe Pacific Railroad Company became a party to this suit by filing its petition to have a notice to creditors published, on the 19th day of December, 1898, more than six months after filing of the intervening petition, and nearly six months after its dismissal, it did not become a party to this intervening petition, which had already been dismissed from the case, or a party to it after its reinstatement.

See:

Houston & T. C. Ry. Co. v. Crawford, 88 Tex. 277.
Smith, et al. v. Woolfolk, 115 U. S., 149.
Great Western Tel. Co. v. Purdy, 162 U. S., 329, 336.
Reynolds v. Stockton, 140 U. S. 254.
Gray v. Brignardello, 1 Wall., 627.

FIFTH.

After the overruling of the plea in abatement, the appellants filed a joint and several demurrer to the intervening petition. (Pr. Tr. pp. 132 to 151.) This demurrer contained, among others, the following specific grounds of demurrer:

"2d. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1892, at the sum of $214,500.00 as aforesaid.

3d. That neither the portion of said intervening petition referred to, nor the intervening petition in its

entirety discloses that the property alleged to have been listed at the valuation of $214,500.00 had any of the taxes sought to be recovered assessed against it by the collector, or any other person, upon such assessment.

* * * *

6th. That said intervening petition shows upon its face that the property pretended to have been assessed was real estate, and that no sufficient description of such real estate was made upon which any valid assessment could be based, or taxes levied.

7th. That the description given in the assessment referred to of the property assessed was, and is, wholly insufficient to identify such property so that the identical 33 miles referred to in such assessment can be distinguished from the entire 93.7 miles of right of way in Valencia county, New Mexico, shown to exist by said intervening petition."

In our brief, filed in October, we, in substance, presented the following argument, in support of the grounds of demurrer above set out:

All the property included in the additional assessments was, and is, real estate under the provisions of section 2807 (see Appendix to our Brief) of the Compiled Laws, is settled beyond any question of doubt by the decision of this Court in the case of the Territory of New Mexico v. The United States Trust Company (172 U. S. 171).

Section 2834 (see Appendix to our Brief) provides for the making of an assessment book, or roll, in which are entered the different kinds of property to be assessed, etc.

Section 2835 (see Appendix to our Brief) provides that each tract of land shall be valued and assessed separately, etc.

It will be seen by the sections of the Statutes of New Mexico referred to that the scheme provided for the assessment and taxation of property requires a list in writing made

by the owner, or person in charge of property liable to assessment and taxation; but if the owner is absent, or unknown, and the property is not listed by anyone else, then the assessor himself makes the list.

By the provisions of sections 4035 and 4036 (see Appendix to our Brief), *supra*, omitted property when assessed by either the assessor or collector is to be listed as well as valued. It is perfectly evident that the list of property for assessment, whether made by the owner, person in charge, assessor or collector, must contain such a description of the real estate as is required by the provisions of section 2822.

The statutes referred to are practically copies of the statute in force in Montana, as will be seen by referring to the opinion of Justice Knowles in the case of Powder River Cattle Company v. Board of Commissioners, 45 Fed. 325.

The Supreme Court of Montana, in construing this statute in the case of the N. P. R. R. Co. v. Carland (5 Montana, 146, 3 Pac. Rep. 134), holds that the necessity of the description required by the statute, of real estate, separate and by itself, is a necessary part of the statement, and an assessment of property which does not comply with it is absolutely void. To the same effect is the decision of Justice Knowles above referred to.

This Court in the case of Lyon v. Alley (130 U. S. 177) lays down the rule as follows:

> "When the requisitions prescribed for the assessment and collection of taxes are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory, but mandatory, and must be followed.

Provisions of statutes as to the form and mode of assessments, and the place where the tax lists are to be deposited, are designed for the benefit of the taxpayers and the protection of their property from sacrifice."

See also to the same effect:

French v. Edwards, 13 Wall. 506.

Bird v. Benlisa, 142 U. S. 664.

Van Cise *et al.* v. Carter, 68 N. Y. 539.

The exhibit showing the details of this assessment discloses that there were 93.7 miles of these improvements on the right of way of the railroad company in Valencia county, 33 miles of which were by the statements made in the assessment exempt from taxation, and from the same statements 60.7 miles were not exempt, and that these 60.7 miles of this total mileage which were not exempt were assessed in gross at $394,550. (Tr. p. 63.)

Whether these 60.7 miles that were subject to taxation according to the statements made in this assessment, were together, in a continuous line, or separated by any of the miles that were exempt, does not appear. This assessment was, and is, precisely like an assessment of 63.7 acres of land in a tract of 93.7 acres, without any description to identify any one of the 63.7 acres from any other one of the 93.7 acres. Would it be possible for the owner, or for anyone else, to determine where any one of the 60.7 miles that entered into this assessment was located in the total mileage of 93.7 miles in Valencia county? Was this such a description as the mandatory provisions of the statute required?

As an answer to this question we quote from the decision of the Supreme Court of Nebraska in the case of Johnson County v. Tierney *et al.* (76 N. W. 1090), as follows:

"The assessment and taxation of lot 5 for 1882, and 1883 was under this description: 'Part of lot 5.' This designation, considered by itself, or in connection with the evidence contained in the record before us, furnishes no means by which we can determine, or even conjecture, what portion of the property is charged with the taxes. It was not a fractional lot. It was all owned by the heirs of Mary A. Tierney. It was all subject to taxation, yet only a part of it was taxed. We cannot say what part and therefore hold that the taxes are void. Lessee of Massie's Heirs v. Long, 2 Ohio 287; Lessee of Mathews v. Thompson, 3 Ohio 272; Ronkendorff v. Taylor's Lessee, 4 Pet. 350; Burchard v. Hubbard, 11 Ohio 316; Raymond's Lessee v. Longworth, 14 How. 76; People v. Flint, 39 Cal. 670; Atwell v. Zeluff, 26 Mich. 118; Sims v. Warren, 67 Miss. 278, 7 South 226."

We also quote the first point in the syllabi in the decision of the Supreme Court of Louisiana in the case of Augusti *et al.* v. Lawless *et al.* (14 Southern 228):

"An assessment that does not contain a description sufficient to identify the property assessed is illegal and void, and therefore beyond the healing power of the curative statute of 1884, a sufficient description of the property being an indispensable prerequisite to the exercise of the taxing power."

We also quote the third point of the syllabi in the decision of the Supreme Court of Michigan in the case of Jackson v. Sloman, 75 N. W. 282, as follows:

"In assessment proceedings, the description of the land must be sufficiently definite and certain as not to

require resort to extrinsic proof that a particular piece of land was designated."

See, also,

Jones v. Pelham, 84 Ala. 208.

People v. Mahoney, 55 Cal. 286.

Raymond v. Longworth, 14 Howard 76.

Turner v. Yeoman, 16 Ohio 25.

Sims v. Warren, 67 Miss. 278.

People v. Hyde, 48 Cal. 431.

Ainsworth v. Dean, 21 N. H. 400.

Treon v. Emerick, 6 Ohio 391.

Cooley on Taxation, 281.

Jory v. Palace Dry Goods and Shoe Co. (Ore.), 46 Pac. 786.

Van Cise *et al.* v. Carter, 68 N. W. 539.

As before stated, the intervening petition was required to set forth sufficient facts to show that the tax sought to be recovered was a valid and legal tax, which was a lien upon certain real estate, describing it. (See section 4157, Compiled Laws New Mexico, Appendix to our Brief.)

State v. Howard, 80 Ind. 466.

People v. C. P. R. R. Co., 83 Cal. 393.

The collector acting under the authority of section 2848 of the Compiled Laws of 1884 (see Appendix to our Brief) was required "to list, value and assess such property." The requirement that the collector should assess such property after its valuation was a requirement that he should extend the taxes levied against its value.

Savings Bank v. United States, 19 Wall. 227.

People v. Weaver, 100 U. S. 545.

The intervening petition fails to allege any extension of any tax against the valuation of the property. It simply alleged the valuation made by the assessor, and then the rate of taxation which was in force during the year 1892; it nowhere alleged that the collector entered upon the tax rolls any tax against this valuation; hence the third ground of the demurrer should have been sustained.

State v. Perkins, 24 N. J. L. 409.

Seymour v. Peters, 67 Mich. 415.

C. M. & St. P. Ry. Co. v. County of Cossuth, 41 Iowa 57.

Barker v. Early, 33 Mo. 677.

Moon v. March, 40 Kansas 58.

While this demurrer is not specifically mentioned in the opinion, our argument in support of it is probably intended to be answered, by the following statement in the opinion:

> "While the description in the intervening petition of the property sought to be subjected to the taxes may be indefinite, the property is sufficiently described in the decree, and it must be assumed that the testimony warranted the description."

It seems to us, with deference, that we had a right to have the demurrer sustained. The fact that subsequently the Court, from the testimony, found sufficient facts, to make up a clear description, of the property assessed and taxed, would not waive its error in overruling the demurrer, or its further error in finding something not warranted by the issues made in the pleadings.

Teal v. Walker, 111 U. S. 242.

Bauserman v. Blunt, 147 U. S. 652.

SIXTH.

This Court, in determining that it could not consider the facts found, and certified to it, by the Supreme Court of the Territory, upon the question, as to whether such facts supported the judgment of that Court, in so far as that Court determined, that the right of way of the Atlantic & Pacific Railroad, where it crossed certain Spanish grants, was not exempt, but was right of way acquired from private ownership, overlooked, as we believe, not only the record, but the oral argument presented at the hearing by counsel for appellant.

I.

The brief of appellee, which first presented the objection, to the consideration of the findings of the Supreme Court of the Territory, was, as the writer remembers, filed the day this case was called by the Court for hearing. In the oral argument, made by counsel for appellants, at the hearing, there was, in substance, presented to the Court, the proposition; that there were sufficient ultimate facts, found by the Supreme Court of the Territory, (including those ultimate facts stated in the agreed statement of facts) in relation to this matter, to clearly present every question, sought to be presented by appellants, except, perhaps, as to the one question, of the character of some of the grants; that such ultimate facts, from their very nature, could not be modified, or changed, in any way, by the probative or evidential facts, or the evidence, contained in the statement of facts certified by the Supreme Court of the Territory, in addition to such ultimate facts, hence that, under the Act

of April 7, 1874, the Court should consider these ultimate facts, treating the evidential facts as mere surplusage.

Believing that our position was correct, we ask the consideration of it by the Court. To illustrate what we meant:

If the Supreme Court of the Territory should find the facts in any given case, as required by the Act of Congress, and should also attach to such findings, the evidence in the case, the fact, that the evidence appeared with the findings, could not, as it seems to us, affect the jurisdiction of this Court, to pass upon the findings of fact, and their sufficiency to support the judgment.

Again, it having been held several times by this Court, that an agreed statement of facts, adopted by the Supreme Court of a Territory, would answer, for all purposes, the requirements of the Act of April 7, 1874, (Stringfellow v. Cain, 99 U. S. 610; Haws v. Victoria Copper Min. Co., 160 U. S. 303; Apache County v. Barth, 177 U. S. 540) in relation to the findings of fact therein mentioned, it would seem to follow, that where an agreed statement of facts adopted by the Territorial Supreme Court, contains ultimate facts, and evidential facts, or evidence, that this Court would have jurisdiction to, and could, examine the ultimate facts, upon a question of this character, if it would appear that such ultimate facts could in no wise be affected by the evidential facts, or the evidence, contained in the record. In this case, we contend that the facts sought to be presented to this Court on this question, were the facts found by the Supreme Court of the Territory, and acted upon in rendering its judgment. As said by the record (the italics are ours):

"that the said agreed statement of facts sets out the

facts of this case which were heard or considered by this Court upon said appeal, and the same is hereby adopted by this Court *as its statement of such facts* for use upon the appeal aforesaid without here repeating the same." (Pr. Tr. p. 316.)

Thus the Supreme Court of the Territory said, that it not only adopted the agreed statement of facts, but that the facts stated in it were adopted by that Court, "as its statement of such facts for use upon appeal." Upon precisely such a certificate, this Court assumed jurisdiction to determine, and did determine, the case between these parties, reported in 172 U. S. 171.

It seems to us, that this precise question, was determined by this Court in the case of City of St. Louis v. Western Union Telegraph Co. (148 U. S. 92), where the learned Justice, who delivered the opinion in this case, said in that case:

"At the threshold of the case we are met with the objection that there are no special findings of fact, and that, therefore, our inquiry is limited to questions arising upon the pleadings, or upon rulings made by the Court during the progress of the trial. * * It is enough to say that in this case there was, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law, that the plaintiff was entitled to judgment for the sum claimed, which instruction was refused, and exception taken; and this, as was held in Norris v. Jackson, 9 Wall. 125, presents a question of law for our consideration. Further, there was, as also appears in the bill of exceptions, an agreement as to certain facts, which, though not technically such an agreed statement as is the equivalent of a special finding of facts, yet enables us to approach the consideration of the declaration of law with a certainty as to the facts upon which it was based. It is true that, in addition to these agreed facts, there was some oral testimony, but as it appears from the opinion of the Court that it made

a distinct ruling upon a proposition of law not at all affected by the oral testimony, and which in its judgment was decisive of the case, we cannot avoid an inquiry into the matter thus determined. We, therefore, pass to a consideration of such questions as are distinctly presented and clearly involved."

The following *ultimate* facts appear from the record, which the Court will see could by no possibility be changed by anything else in the record, and therefore necessarily were the only facts upon which the determination as to this question was made by the Territorial Court:

"The Atlantic & Pacific Railroad Company named in the intervening petition, was incorporated under the act of Congress, approved July 27th, 1866. That prior to March 12, 1872, the Atlantic & Pacific Railroad Company had definitely located its line of road through the county of Valencia, and on March 12, 1872, it filed in the office of the Secretary of the Interior of the United States a map showing its line of definite location through the Territory of New Mexico. That at the time said company definitely located its line of railroad under said act of Congress, through the county of Valencia, in said Territory, no survey of the lands in that county had ever been made by the government, or by any one else. That the entire right of way of the said railroad company as located through that county, (and at the time of the building of the railroad thereon) was located upon and over land which consisted of high, desert table lands, hills and one or two small valleys. That no part of the right of way at the time when located and built upon passed over any cultivated, enclosed or occupied lands in Valencia county, save and except some small tracts cultivated by the Indians in the Pueblos of Laguna and Acoma, within the limits of such Pueblos. That at the time of the location of said line, and the building of the railroad thereon, there was nothing, so far as the eye could see from any part of the right of way, to distinguish the land over which said line of right of way was located, from

any other wild, uncultivated, uninhabited and unsurveyed lands situated in said county, except where it passed across the two Pueblos referred to and except also that somewhere on each of the grants hereinafter referred to there were persons living who claimed ownership to the exterior boundaries thereof. * * * That the line of railroad referred to as located, built and constructed, passes going from the east to the west through a portion of the county of Bernalillo and across a portion of the county of Valencia, in New Mexico. That upon crossing the line between Bernalillo and Valencia county in going west, this railroad is located and built upon land claimed to belong to two Spanish grants, now known as the Joaquin Sedillo and the Antonio Guiterrez grants. That the grant papers pertaining to each of the above named grants were a part of the archives of the Government of Spain, received by the Government of the United States from Mexico and in the custody of the Surveyor General of New Mexico ever since the organization of his office in 1855, but were never presented to the Surveyor General of the Territory of New Mexico or filed or recorded in any public office in the Territory of New Mexico, except as afore-stated prior to the 9th of September, 1896, when a petition was filed in the office of the clerk of the Court of Private Land Claims, at Santa Fe, New Mexico, by the claimants to the land of each grant separately against the United States. * * * That the right of way going west crosses these two grants in a southwesterly direction, crossing the north and south line of each. That the length of the right of way over these two grants is about 4 miles. That prior to the filing of the petition in the Court of Private Land Claims, as stated, no one, including even the owners of the grants, knew of their existence, except that in the trial of the San Clemente case in the Court of Private Land Claims, the government found and produced, in that case the archives tending to show these two grants. That prior to the decision of the Court of Private Land Claims in this case, no one could have determined where the north and south line of said grants, or either of them, was located, or the width of them, or either of them north and south, except

that the north line was the south line of the previously surveyed and patented Isleta Pueblo grant and the south line was the north line of the San Clemente grant as confirmed by the Court of Private Land Claims. That prior to the decision referred to there never was any segregation of the land contained in these two grants from the public lands of the United States, or from the lands of any one else except as may appear from facts stated herein. That prior to the filing of the petition in each of these cases in the court of private land claims, no officer, agent or servant of the Atlantic & Pacific Railroad Company, or of C. W. Smith, late receiver, or of the United States Trust Company of New York had any actual or constructive knowledge of the existence of either of these two grants, except as may be shown by the facts herein set forth. That upon crossing these grants, said right of way is over a portion of a Spanish grant, known as the 'San Clemente' grant, for a distance of about 10.5 miles.

That the right of way crosses the north, south and west lines of said grant. * * * That prior to the survey made under the decision of the Court of Private Land Claims in this cause, no one could have determined actually, where the line of railroad entered into or passed out of this grant, or how much mileage there was over lands belonging to this grant. That while some portions of this grant were occupied by the owners of interests in it, yet none of the portions covered by the right of way of said railroad company were occupied, or cultivated, and the owners claimed the north line to embrace lands contained in the two grants above stated, and the survey of 1878 was in accordance with that claim. * * * That prior to the decision of the Court of Private Land Claims in this case, it would not have been possible for any one to have actually determined how many miles of right of way of the railroad company was located upon lands covered by this grant, or where the said right of way crossed the exterior lines of this grant. * * * That the right of way crosses from the San Clemente grant into another Spanish grant known as the Nicolas Duran de Chaves grant, crossing the north line of the last named grant a little

ways, and recrossing again into the San Clemente grant; that said right of way is located upon the last named grant, as it is now established, about 2¼ miles, the point of entrance in said last named grant being about twelve miles west from the Rio Grande valley.

That prior to the survey and confirmation thereof, it would not have been possible for any person to have ascertained or determined where the right of way entered and left the lands covered by said Spanish grant. The location of the northern boundary line, which is crossed by the right of way, both in going into the grant and in coming out, was always a matter of dispute between the parties claiming this grant and the owners of the grant lying to the north.

That the point where the right of way crosses the northern line of this grant going west, is about twelve (12) miles distant from the Rio Grande valley, where the settlements upon this grant were, and that that portion of the lands of the grant covered by the right of way was and is and always has been a sandy desert tract of high table land, uninhabited and unoccupied.

That the right of way of said railroad company on going west on crossing the west line of the San Clemente grant, crosses a small piece of public land and then crosses in a northwesterly direction the south and west lines of a Spanish grant known as the Antonio Sedillo or Canada de los Apache grant; that the length of the right of way over the land contained within the exterior limits of this grant is thirteen miles; that the history of this grant is as follows:

The grant was executed in 1769. The petition was filed in the office of the Surveyor General of New Mexico on April 6th, 1871. On November 6th, 1871, The Surveyor General reported to the Interior Department, approving the grant. In April, 1872, the report of the Surveyor General was transmitted to Congress, and on October 11th, 1886, a supplemental report was made by the then Surveyor General recommending the rejection of the claim, and on November 24th of that year this report was transmitted by the Surveyor General to the Commissioner of the General Land Office. In September, 1877, a preliminary survey was made

under the direction of the Surveyor General, which shows the grant, except as to the north boundary, just as subsequently confirmed by the land court. On December 6th, 1887, the supplemental report of the Surveyor General recommending the rejection of the claim, was transmitted to Congress. * * * That the survey of said grant, made under and in pursuance of the decision of the Court of Private Land Claims, has not yet been approved; that where the right of way crosses this grant, at the time of its location, and ever since that time, the lands were uninclosed, uncultivated and unoccupied, and consisted entirely of high desert lands, with nothing to distinguish the lands of the grant from the public lands of the United States.

That, outside of the statement herein contained, there has been no segregation of this grant from the public domain; and the officers of the railroad company, of the receiver and of the United States Trust Company had no more knowledge of this grant than they had of any of the others, as herein stated.

That, prior to the determination by the Court of Private Land Claims, it would not have been possible to locate the exterior lines of said grant, except as the preliminary survey may have shown them.

That neither the Atlantic & Pacific Railroad Company nor its receiver or assigns, have acquired by purchase or by condemnation any portion of the right of way over the lands contained in the last named grant. * * * That after crossing a portion of the grant last referred to, the right of way crosses for two Spanish leagues a grant confirmed by the Court of Private Land Claims sitting at Santa Fe, New Mexico, and known as the Laguna Pueblo. It crosses this grant from east to west and for a distance of 6 1-2 miles.

That when the right of way was located, and from that time since, it passed around a hill on which the village of the pueblo was, and since has been, located. * * * That from the west line of the pueblo, as fixed by the Court, the right of way passes over about two Spanish leagues of public land and then again crosses from east to west the lands heretofore referred to as the Laguna Indian Pueblo Tracts.

That the general characteristics of the country crossed by the right of way in passing from the east line of tne Laguna Indian Pueblo Tracts to the final west line of the same tracts is the same as heretofore described, with the exception that in several places small portions of land included within each of the grants last referred to as crossed by the right of way, were long prior to the location of said line, and ever since said date have been cultivated, though not inclosed, by the Indians of Laguna. * * * That the officers and agents of the railroad company and the receiver had no other or further knowledge concerning these last named grants than they had concerning any of the other grants herein referred to, except such as would be derived from the settlement and cultivation of these grants by these Pueblo Indians, as stated, and that no segregation except as herein stated, of the lands of this grant from the remainder of the public domain was ever made until the decision of the court referred to, and until that decision, it would have been impossible to have located the same.

That the right of way after crossing the west line of the last Indian Pueblo Tracts, crosses over lands contained in the Spanish grant known as the Acoma pueblo; that the land over which the right of way crosses in this grant is of the same general character as those contained in the other grants; that the Indian pueblo of this grant is out of sight from any point on the right of way; that there was some small acreage cultivated by the Indians, but not enclosed, over which the right of way was located. The right of way over this grant is 12 1-4 miles in length.

That an application for this grant was filed in the office of the Surveyor General of New Mexico, March 3; 1856, and that the application, with the recommendation of the Surveyor General was transmitted to the Commissioner of the General Land Office, September 30th, 1856, and was confirmed by Congress by act of December 22nd, 1858. * * * That the survey of this pueblo was made in March, 1877, and June 5th, 1877, it was approved, and November 19th, 1877, a patent was issued.

That none of the officers or agents of the railroad company, or the receiver ever had any further or other information concerning the boundary lines of this grant than they had of any other of the grants referred to, except the further fact that they had knowledge that there was some cultivation by the Indians, and also of the existence of the pueblo village. That until this survey was made no one could have located the exterior lines of this grant accurately."

(Pr. tr. pp. 212, 213, 217, 227, 232, 252, 253, 258, 259, 268, 273, 274, 276, 277.)

The Supreme Court of the Territory made, upon the other facts, disclosed by the record, in connection with these Spanish grants, the following findings:

"That the line of road, the improvements upon which were assessed by the collector aforesaid, runs through Spanish grants as follows: Through the Joaquin Sedillo and Antonio Guiterrez grants for a distance of four miles; through the San Clemente grant for a distance of ten and one-half miles; through the Nicolas Duran de Chaves grant for a distance of two and one-quarter miles; through the Antonio Sedillo grant for a distance of thirteen miles; through a portion of the Laguna purchases for a distance of seven miles; through the Laguna pueblo grant for a distance of six and one-half miles, and through the Acoma Pueblo grant for a distance of twelve and one-quarter miles, making a total of fifty-five and one half miles; that of said grants the Laguna purchases were confirmed by Congress in 1860, the Acoma Pueblo grant was confirmed by Congress in 1858, and each of the other grants has been confirmed by the Court of Private Land Claims, which court, in each case, declared the title to have been complete and perfect at or before the time of the acquisition of sovereignty by the United States over the country embraced within the present Territory of New Mexico, and that all such confirmations have become final."

It will be seen that the ultimate facts hereinabove copied

and adopted as the findings of fact, by the Territorial Supreme Court, and its express findings, disclose: That the right of way crossed certain Spanish grants, which the Court of Private Land Claims determined were perfect grants, at or before the time of the acquisition of the territory by the United States; that no one of these Spanish grants was segregated from the public domain at the time of the definite location of the right of way over the same; that at the time of the definite location of the right of way over these grants, no one of the grants, or any other portion of the public domain in Valencia county, had been surveyed by the United States government, or by anybody; that there was nothing to indicate or show where these grants, or either of them, were situated, or where the lines of either of such grants were; that the Atlantic & Pacific Railroad Company, and its officers, in making its definite location across these grants, having no knowledge of the existence of these grants, or either of them, assumed that the lands over which the line was located were public lands of the United States; that the portion of these grants covered by the right of way was not occupied, or in the possession of anyone, and presented the same character of desert that the balance of the surrounding country presented, except as to some tracts of land cultivated by the Indians; that the railroad company never purchased, or acquired in any way, any title to any of the land covered by its right of way in Valencia county, save and except the title conveyed to it by the second section of its grant, upon the definite location of such line of right of way; that the only evidence of the fact that any of these grants were Spanish grants is contained

in the decision of the Court of Private Land Claims, which could only be binding between the claimants before the Court and the United States government.

Upon these facts we call the Court's attention to the argument and authorities in our brief, filed in October, commencing on page 104, to page 110, and pages 115 to 125. It is clear that the Supreme Court of the Territory largely based its judgment upon judgments of the Court of Private Land Claims as being conclusive as to third parties, hence with the decision of this Court in City of St. Louis v. W. U. Tel. Co., *supra*.

If the ultimate facts presented in this record were not sufficient facts to be considered (and it is apparent that they are the facts upon which the Supreme Court of the Territory based its judgment) this Court, instead of refusing to consider the same, should award a *venire facias de novo* to the Supreme Court of the Territory, on the authority of Chesapeake Ins. Co. v. Stark (6 Cranch, 268); Livingston v. Maryland Ins. Co. (6 Cranch, 274); Barnes v. Williams (11 Wheat. 415); Saltonstall v. Birtwell (150 U. S. 419), and cases therein cited.

SEVENTH.

The judgment of the Supreme Court of the Territory, determining that its judgment was a lien upon specifically described portions of the right of way, was erroneous, because of the fact that there was no allegation in the intervening petition alleging that the taxes were a lien upon any specific portion, or on any portion of the property described, or of the entire right of way. It is true that the prayer of the petition asked that the total amount of taxes might be decreed to be a lien upon the property of the railroad company in the hands of the receiver, but it did not describe the property referred to, and at that time, as said by the Court in its opinion, the right of way itself was held by the receiver as the agent of the purchasers, and not as receiver. The general prayer for relief, it seems to us, should not be held to be broad enough to cover a decree of a specific lien on specific portions of the right of way of the railroad company.

All of which is respectfully submitted.

C. N. STERRY,
Solicitor for Appellants.

E. D. KENNA,
ROBERT DUNLAP,
of Counsel.

I, Robert Dunlap, of counsel for the Appella
herein, do hereby certify that in my judgment the
going petition for a rehearing is well founded a
the same is not interposed for delay.
(Signed) Robert Dunlap

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 181.

THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL., APPELLANTS,

vs.

TERRITORY OF NEW MEXICO.

COUNTER STATEMENT OF CASE.

Before entering upon the case, counsel for appellee desires at the outset to invite the attention of the court to the question as to whether the appellants have brought their record into this court in such shape as to entitle them to any review whatever. This is set out under the first "Point" hereinafter contained. Appellee does not, however, shrink from the fullest possible argument of the case, and will proceed herein as though said point were not made, although all consideration of the case on this appeal is cut off if that point is well taken.

While appellants in their "Brief" have attempted to make a "Statement" of this case, yet, from the point of view of the appellee, they have included in that statement much which is irrelevant and unnecessary; have omitted some things which may be of importance, and have so stated others as possibly to produce misleading impressions.

I shall, therefore, without specifically making answer to what is stated by appellants, briefly set out what is necessary for a distinct understanding of all that is for argument on this appeal.

In July, 1895, the United States Trust Company of New York, one of the appellants herein, began a suit in the district court in New Mexico to foreclose a mortgage on the western division of the Atlantic and Pacific Railroad Company, and in January, 1896, Charles W. Smith, the other appellant, was appointed receiver in said suit, and put in possession of all of said property. On April 10, 1896, a decree was entered in said suit, directing the sale of said property; and that decree contains provisions requiring the purchasers at the sale, or their assigns, to pay, among other things, all indebtedness incurred by the receiver or by the railroad company prior to the receivership, upon the court adjudging the same to be superior to the lien of the mortgage. Permission was given to holders of claims for such indebtedness to file, upon fifteen days' notice to the purchasers, petitions to have their claims enforced against the property. No form or method of notice was prescribed. It was further provided that—

> Any such claim for indebtedness, obligations or liabilities which shall not have been presented in writing to the receiver or filed with the clerk of this court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the receiver of a notice to the holders of such claims to present the same for allowance.
>
> Printed Record, pp. 39–40.

As will be seen hereafter, the claim of the Territory for taxes herein sought to be recovered, was filed with the clerk of the court before the delivery of possession of the property, and was again presented to the court within six months

after the first publication of said notice by the clerk, who was, at request of the assign of the purchasers, substituted for the receiver as to the publication of the notice.

The property was sold under the decree on May 3, 1897; and on May 4, 1897, the sale was confirmed, the order of confirmation containing like provisions as to payment of debts by the purchasers or their assigns, with a new clause that these should include—

> "also any taxes which may finally be adjudged to be a lien upon the property sold under the decree aforesaid."

These words were inserted at the instance of the counsel for the Territory, in the presence and hearing of the purchasers.

Printed Record, pp. 284 and 125–6.

Both the decree and the order of confirmation contained provisions retaining jurisdiction over the property for the purpose of enforcing claims against it, even to the extent of retaking and reselling it if necessary, and each also stated that claims not filed within six months after publication of the notice, would not be enforceable against the receiver, property, purchasers or their assigns. This was the only provision for finally cutting off claims against the property.

On June 2, 1897, the master made a deed to the purchasers, which was filed for record June 12, 1897, and the property was delivered by the receiver to the Santa Fe Pacific Railroad Company, the assign of the purchasers, on July 1, 1897. The receiver was not discharged until October, 1898.

On June 10, 1897, before any public knowledge that the deed had been made and long "prior to the time of delivery" of the property, the Territory filed with the clerk of the district court, its intervening petition which is the beginning of this proceeding, asking primarily that the taxes be declared a lien on the property, and secondarily

that the receiver, in whose hands was the property, should be ordered to pay the taxes, with interest, to the collector of taxes for Valencia County. The taxes claimed were on the improvements on the right of way of the Atlantic and Pacific Railroad Company where the same runs over what was public domain when the right of way was granted to said company, thirty-three miles in length, valued at $6,500 per mile, making $214,500; on like improvements on the said right of way where it runs over land which was held im private ownership at the time of the grant to the railroad company, 60.7 miles, at same value per mile, making $394,550; and on improvements at eight stations valued at different amounts for different years.

The petition set out that this property had been omitted from assessment for a series of years from 1892 to 1896, and that the collector had, after the tax list for 1896 was delivered to him, listed, valued and assessed the property and entered such assessment on said tax list. The valuation, the rate of tax levied, and amount of taxes, for each year, were severally set out.

On the 23d of June, 1897, the United States Trust Company, complainant in the foreclosure case, and the receiver in whose custody the property then was, filed their verified pleas, which, with accompanying exhibits, cover pages 58 to 103, both inclusive, of the Printed Record.

From this great mass of words we may extract the admission, made carefully, and repeated five different times:

> That about fifty-eight miles of said right of way in said county and Territory was and is through land which was not government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress.

This truthful admission appellants have struggled hard to get away from, but without success. Their attempt to do so will be found set out in the affidavit of their learned counsel, in the Record, at pages 110 to 112. On page 112

he says that he made the admission "simply for the purpose of raising the legal questions to be presented by the pleas," and not as an admission of fact. The ingenuity of man can not find in the pleas any "legal question" to the raising of which this admission was necessary.

The pleas also set up objections to the assessments, and the pendency of another intervening petition, in another case, by another petitioner, the collector of Valencia County, asking for taxes of 1892 and 1893, on the basis of earlier, defective and invalid assessments.

The district court dismissed the intervening petition without passing on the pleas. The case reached this court and was here argued in 1898. This court did pass upon the objections to the validity of the assessments, favorably to the Territory, held that the right of way over the land admitted not to have been public domain, was subject to taxation, and remanded the case for further proceedings in accordance with its opinion.

While the case was pending here, the clerk of the district court, pursuant to an order, made on the application of the Santa Fe Pacific Railroad Company, the assign of the purchasers at the foreclosure sale, published the notice to creditors provided for in the decree and order of confirmation, beginning April 3, 1899, and requiring claims to be filed with him as clerk on or before October 23, 1897.

Printed Record, pp. 104–5 and 296.

In August, 1899, the mandate in this case was filed in the district court and the former judgment was vacated and set aside. Further proceedings were had, resulting in a final decree on October 5, 1899.

After the case reached the district court the defendants were permitted to file motions to dismiss while the original pleas in bar were still pending and undisposed of; were then given leave to withdraw those pleas and file a plea in abatement; were then permitted to file a demurrer and afterward pleas in bar; all of which were denied, overruled

or held insufficient. Finally the defendants filed an answer to the petition and the case was submitted to the court upon the petition, answer, an agreed statement of facts, and the files and records of the case.

The district court found in favor of the Territory, but not to the full extent of its claims. It disallowed amounts claimed under certain levies for the payment of judgments against Valencia County; refused to allow the statutory penalty for failure to make returns of property for purposes of taxation; refused to allow the statutory interest of 25 per centum on delinquent taxes; but did allow 6 per centum interest. Both sides appealed to the supreme court of the Territory, and that court restored the amounts claimed under the judgment levies, but struck out all allowance for interest, affirming the district court in other respects.

Both sides have appealed to this court.

In an Appendix to their Brief appellants print certain New Mexican statutes in such way as to be confusing. Some sections are credited to compiled laws of 1884 and others to compiled laws of 1897; but all of these, except sections 345 and 343, on page 165, are really parts of one act, passed in 1882, and all appear in both compilations of 1884 and of 1897.

PRELIMINARY.

It is difficult in the very limited time at my disposal before this case will be reached for hearing, fully to examine, and impossible in detail to answer, the voluminous printed argument submitted on behalf of appellant. It may be well, however, to make some attempt here to condense the contentions of appellants, that we may, if possible, see clearly what they present for consideration. The following is submitted as a *resume* of their points, with references to pages of their brief:

1. The proceeding is one against the receiver only, and upon his discharge in October, 1898, the court lost jurisdiction if it ever had any (*pages 47 to 55*).

2. The court never had jurisdiction, because the Territory did not present its claims to the purchasers, nor give them fifteen days' notice of intention to file petition (*pages 56 to 68*).

3. The taxes never had any existence until June 7, 1897, which was after the sale of the property, and would not be due until more than six months later (*pages 69 to 71*).

4. The plea in abatement must be taken as absolutely true (*pages 73 to 74*).

5. The additional assessments are defective, because they do not sufficiently describe the property assessed, and the intervening petition fails to allege that the collector extended the taxes on the tax rolls (*pages 75 to 82*).

6. The collector had no authority to make the additional assessments because the property had already been assessed by the assessor, no matter how defective the previous assessment may be, or even if it be void (*pages 85 to 91*).

7. Improvements on real estate can not be assessed separately from the land to which they are attached.

8. The collector could not lawfully make additional assessments of property omitted from the tax rolls at any time between the first of March, 1897, and the time when he received the new tax rolls on September 6, 1897 (*pages 94 to 97*).

9. The additional assessments are void because no notice thereof was given to the purchasers (*pages 97 to 99*).

10. The taxes did not exist until after the property was sold and delivered (*page 100*).

11. Land within Spanish grants, in part confirmed by Congress prior to 1866, and the remainder confirmed by the court of private land claims and this court, as perfect titles, must be, for the benefit of this case, treated as public domain, because the grants had not been surveyed before the railroad company had located its line (*pages 103 to 154*).

The Territory contends that of the foregoing enumerated points, the first, ninth and tenth are based upon misconceptions of both fact and law, and that the others are all unsound as matter of law, and the most of them trivial and unimportant. It may be well said, that none of them, except the eleventh, make any substantial attack upon the correctness of the decree of the court below, and that the eleventh sets up a proposition which can find no support either in reason or precedent.

The third and tenth propositions are identical. The seventh was presented to this court on the former appeal of this case, and quite fully argued, but as it appears to have had no effect on the decision of the court, I shall take up no time in discussing it.

No attack is made on the fairness of the valuation of the property, nor upon the regularity of the tax levies by the county and territorial authorities.

All that there is worthy attention in the propositions of appellants, will be considered hereinafter, although, perhaps, not in terms directly responsive to the language used in appellants' Brief.

POINTS AND AUTHORITIES.

FIRST.

The Appellants Have so Made up their Record as to Preclude any Review of the Case in this Court.

When appeals were taken from the decree of the supreme court of New Mexico, the Territory applied to the court to make a statement of facts for use, instead of the evidence at large, on said appeals, in accordance with the requirements of the act of Congress of April 7, 1874, concerning appeals from territorial courts, which has been the subject of frequent consideration in this court. This ap-

plication was resisted by the other side on the ground that the case in the district court was tried on an agreed statement of facts, and therefore it was improper for the supreme court of the Territory to make or certify any other statement of facts. The result of these opposing views will be found in the Record at page 316, where it appears that—

> "the court being willing and desirous that the respective parties be allowed to get their appeals before the Supreme Court of the United States in such shape as their counsel deem proper,"

certified the statement of facts used in the district court for use upon the appeal of the Trust Company and the receiver, and made and certified specific and definite findings of fact, "in the nature of a special verdict," for use on the appeal of the Territory.

The Territory then contended, and still insists, that the agreed statement of facts sets out "the evidence at large", and that an "appeal would be unavailing unless the statement for which it . . . asked be made." The appellants in the present case took a different position, were given what they asked, and are bound by their choice.

Is the agreed statement of facts in this case, such that the court of New Mexico was absolved from the duty of making a statement of facts in the nature of a special verdict for use on this appeal? Examination of the record will disclose that the "agreed statement of facts" is principally a statement of evidence and not of facts. It begins on page 212 of the Printed Record and ends on page 288. It sets out as facts that commissioners of the General Land Office wrote letters which are copied in full, that petitions for the confirmation of grants were filed in the court of private land claims, that other papers relative to grants were also filed in that court, that decrees and opinions were made and rendered by that court, that petitions as to grants were filed in the office of the surveyor general, that testimony was taken before that officer and

that he wrote various opinions, reports and letters about grants, all of which things are set out *in haec verba*, the same as though they had been offered in evidence, without any statement of what they proved. It contains various orders of the commissioners of Valencia County set out in terms, as to the levy of taxes. It contains the testimony of eight different witnesses without any statement that their testimony is true, or of what facts it establishes. Is this something "in the nature of a special verdict?"

If so, then the door is opened for the evasion of the requirements on this point, of the act of Congress of 1874.

SECOND.

The Purchasers at the Foreclosure had Ample Notice of the Claim of the Territory.

A great deal is said in many different places in the "Brief." of appellants as to the failure to give the purchasers notice in accordance with the foreclosure decree, and to make them parties to this proceeding.

So much of the decree as appellants rely on will be found at pages 41–2 of their "Brief." It will be seen that no form of notice or method of giving it is prescribed. Now, by reference to the affidavit of F. W. Clancy, at pages 125–6 of the Record, which is uncontradicted, it will be seen that at the time of the confirmation of the sale (which was on the 4th of May, 1897), the purchasers were fully informed of these claims, of the claim of exemption, and of the purpose to attempt to collect the taxes. This was more than thirty days before the proceeding was begun. The notice was undoubtedly full and complete, as there was "a long discussion."

Under these circumstances, to make a demand on the purchasers and obtain their refusal would have been a

useless formality when every one knew what the result was to be.

As to the suggestion that the purchasers should have been made parties to this proceeding, and the frequent urgings that this is not due process of law, that the owners do not have their day in court, etc., etc., let it suffice to say that this is a proceeding *in rem*, begun while the *res* was in the custody of the court; that any one receiving it from the court took it *cum onere*; that the foreclosure decree does not require that they should be made parties—something the intervenor had no power to do—but merely gives them "the right to appear and make defense."

Have not they, or their assignee, the Santa Fe Pacific Railroad Company, had ample opportunity to appear and make defense? It is shown that "shortly after" the foreclosure sale (which took place May 3, 1897), C. N. Sterry was employed by the purchasers in any pending or future litigation against the receiver (Rec., p. 287); that service of the intervening petition was made at his office in Albuquerque, June 10, 1897, and a letter on the subject written to him the same day, addressed to Los Angeles (Rec., p. 119); that on the 23d of June, 1897, he filed pleas to the intervening petition (Rec., p. 57); that ever since July 1, 1897, he has been the solicitor of the Santa Fe Railroad Company, and in charge of all legal business of that company in New Mexico (Rec., p. 287); and the whole Record shows that he has had charge of the defense of this case from its beginning. They have certainly not been deprived of "the right to appear and make defense."

Moreover, the Santa Fe Pacific Company has made itself a party to the main suit, and is even technically chargeable with a knowledge of these proceedings since December 19, 1898 (Rec., pp. 104, 296).

The purchasers at the foreclosure sale never had possession of the property. When the intervening petition was filed June 10, 1897, the property was still in the custody of

the court by its receiver, who delivered it to the Santa Fe Pacific Company July 1, 1897. The receiver was discharged in October, 1898 (Rec., p. 104). Thereafter, if the company desired to dispute this claim, it had "the right to appear and make defense" to any claim pending against the property at the time of the discharge of the receiver.

In addition to this, on the application of the Santa Fe Pacific Company, a notice to creditors was published, requiring them on or before the 23d of October, 1899, to file their claims with the clerk of the court (Rec., pp. 104–5, 296). They were not required to present them to the purchasers or their assignee, but it was the manifest duty of that assignee to take notice of any such claims. If it could be said that no previous notice had been given, the company certainly after this notice was published by the clerk had its opportunity to appear and defend if it desired to do so. Within the time limited, the mandate of this court was filed with the clerk and judgment thereon entered, and this case reached a final decree before the time expired, the defense being conducted by the general solicitor of the company. It can not be truthfully said that it has been deprived of any constitutional right, especially in view of the provisions of the latter part of paragraph 19 of the foreclosure decree (Rec., pp. 40–1), which are omitted from the quotation in appellants' "Brief" at pp. 41–2 thereof. There was a substantial compliance with the requirements of the clerk's notice to creditors.

THIRD.

This Proceeding was Properly Begun by Notice to the Trustee and Receiver as Ordered by the Court.

Appellants contend that, in some way, the petitioner should have made the purchasers at the foreclosure sale,

parties to this proceeding. In the first place, an intervenor has no such power, and the court, in the discretion of which all such proceedings rest, evidently did not consider such action necessary. This was because the court still held the property. It is true that a sale had been made and confirmed, and a conditional order for a deed and delivery of possession had been entered on May 4, 1897. It now appears from the affidavit of C. N. Sterry, "that as of the date of the 2d day of June, 1897," the deed was executed and delivered (Rec., p. 115); but it also appears from another affidavit that the deed was not filed for record until June 12, 1897 (Rec., p. 119).

The receiver surrendered possession July 1, 1897. This petition was filed June 10, 1897, at which time the court still held the property, and there was nothing to apprise any one that the sale had been completed.

The authorities cited by appellants to show that an action can not be maintained against a receiver after his discharge, are not applicable to the present case. In the first place they relate to independent actions brought against receivers in courts other than those which appointed the receivers; and, second, this court by its foreclosure decree and order confirming the sale, as it had perfect authority to do, prescribed its own course of procedure with regard to claims for which the property might be liable, and clearly contemplated the bringing of such proceedings as the present, in the defense of which the purchasers or their assigns shall have the right to appear if they choose (Rec., pp. 39 to 41, 47–8).

The assertion by appellants that the property had passed into the ownership of third parties, strangers to the suit, before the proceedings were begun, is not quite borne out by the facts. It is true that the deed to the purchasers was made, in the words of Mr. Sterry, "as of the date of the 2d day of June, 1897," (Rec., p. 115), but this deed was not filed for record until after this proceeding had been begun,

and the change of ownership was not completed until July 1, 1897, when the property was delivered to the assignee of the purchasers by the receiver.

FOURTH.

The Description in the Additional Assessment is Sufficient.

Appellants claim that their demurrer should have been sustained on the ground that the description of the property was insufficient because it was not as complete as the description required by section 4032 from the owners of real estate when they make returns. No such particularity of description is required of the assessor when he lists property which has not been returned. The reason for this is obvious. The owner is presumed to know all about his land while the assessor may find it impracticable to ascertain details. And yet appellants at pages 77–8 of their "Brief" would have this court import bodily into sections 4055 and 4056, language which the legislature has not seen fit to put there, and which is found only in another section relating to a different matter. It is not unjust to say that this is a fair sample of the kind of argument by which it is sought to persuade this court that this property should be allowed to escape taxation. The court below certainly took the view that the location and exact description of the 60.7 miles of road sought to be taxed, were matters peculiarly within the knowledge of the other side, especially as there was already in the Record, a five-times repeated and verified admission that there were 58 miles of such road which this court had said was subject to taxation.

That the court was right is evidenced by the fact that the proofs show just where and how much there are of these

miles subject to taxation, and they are set out in the decree, and the appellants furnish a map showing the facts (Rec., p. 277).

Moreover, this court has passed on these assessments, and did so at the earnest solicitation of the other side. There can be no impropriety in calling attention to the fact that in their brief upon petition for rehearing, filed in this court April 3, 1899, the present appellants set out the following proposition:

> If we should admit (that which we most emphatically deny) that the fifty-eight or sixty miles of "right of way" of the Atlantic and Pacific Railroad in Valencia County which was located over lands other than public lands is not embraced within the exemption contained in the second section of the act, such admission would not give any right to this court to reverse the judgment of the Territorial Supreme and District Courts, because in such case, while there might have been an assessment of this fifty-eight or sixty miles of "right of way," and taxes levied thereon, there never was such an assessment or any claim for any taxes based upon any such assessment made by the allegations of the intervening petition, and therefore no issue of that character has ever been presented to this court or to either of the lower courts.

The learned gentleman who conducts this case for appellants, has questioned the validity of these assessments in the highest appellate court in opposition to the mistaken view of counsel for the Territory who in his brief said that "any question as to the irregularity or correctness of the assessment is not before the court at this time." He has been heard, and the decision is against him.

The sections of the statutes referred to, are as follows:

> 4032. The assessor is required, between the first day in March and the first day in May, of each year, to ascertain the names of all taxable inhabitants, and all property in his county subject to taxation.

To this end he shall visit each precinct in the county, and exact from each person a statement in writing or list, showing separately:

First. All property belonging to, claimed by, or in the possession or under the control or management of such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, or cashier, or managing agent.

Second. The county in which such property is situated, or in which it is liable to taxation.

Third. A description by legal subdivisions, or otherwise, sufficient to identify it, of all real estate of such person and a detailed statement of his personal property, including average value of merchandise for the year ending March 1st; amount of capital employed in manufactures; number of carriages and vehicles of every description; jewelery, gold and silver plate; musical instruments; household furniture; moneys and credits; shares of stock of any corporation or company; and all other property not herein enumerated, with the value of the different classes of property in detail.

4055. If by any means any property shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same when discovered shall be listed by the assessor and placed upon his roll before the same is returned to the board of county commissioners, with all arrearages of taxes, which should have been assessed and paid in former years, charged thereon, or in case of failure of the assessor, the same shall be assessed by the collector in the manner provided in the next section.

4056. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate, or any personal property then in his county, are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value, and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list, following the entries made by the clerk, and such entries shall

be designated as Additional Assessments, and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the board of county commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him.

FIFTH.

There was no Error in Refusing to Sustain the Ground of Demurrer Setting up that the Intervening Petition did not Show that the Collector Assessed Taxes on the Assessments.

The argument of appellants shows that what is meant is that the petition did not allege that the collector extended the taxes on the tax roll in his hands.

The court below may well have put its ruling on either or all of three grounds:

First, this ground of demurrer was frivolous and unworthy of serious attention;

Second, such a ground of demurrer came too late, more than two years after the petition was filed;

Third, the matter was one for proof rather than pleading.

As a matter of fact, the proofs showed that the collector did extend the taxes, so that, even if the action of the court on the demurrer were erroneous, the error was not prejudicial, and it is grossly improper to consume the time and attention of this court by urging it here as a ground for reversal.

SIXTH.

The Property Described in the Additional Assessments was Omitted from the Rolls of 1892 to 1896.

Appellants assert that the additional assessments are void because they are of the same property already described on the previous assessment rolls. This is here denied.

This discussion will be limited to so much of the additional assessments as described property which this court says is taxable.

In each one, that property is described as follows:

> "Also the cross ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia, and constituting 'improvements' upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile . . . $394,550."

This clearly describes property subject to taxation, and specifies its status and condition. Appellants have admitted 58 miles of it.

In the rolls for 1892 and 1893, that which appellants claim to be a description of the same property is—

> "Total value of right of way, $327,103.00."

I must refuse to occupy much space with this. No one has ever claimed that the "right of way" over what was public domain was subject to taxation; and in the additional assessments no attempt was made to include any part of the right of way. Upon authority it should be held that as to that part of the right of way over what was private prop-

erty at the time of the grant, the railroad company acquired only an easement.

East Alabama R. Co. *vs.* Doe, 114 U. S. 350.
Keeney *vs.* U. P. R. Co., 31 Fed. 128.
Jones *vs.* Van Bochove, 61 N. W. 343.
Robinson *vs.* Railroad Co., 59 Vt. 426.
Blakely *vs.* Railroad Co., 64 N. W. 972–3.
Kellogg *vs.* Malin, 50 Mo. 499.

Properly viewed, this position is consistent with the opinion of this court in 172 U. S. 171. It is to be noted that the court does not overrule or depart from its holding in 114 U. S. 350, as to the character of estate taken by a railroad company under the power of eminent domain, and that case stands as an authoritative precedent on that subject. In 172 U. S. the court in effect held that Congress in granting a right of way for a railroad through the public domain intended to give something more than a mere easement, and no more.

Therefore "right of way" in the assessment roll as to this part of the road, meant only the easement.

It is urged by appellants that this description—"right of way"—might have been amplified under the power given in section 4091 of the Compiled Laws to correct "omissions, errors or defects in form." Is the description of a mere "right of way" instead of the improvements on the land over which the right of way exists, an error in form? Or is it an error of substance?

Section 4091 of the Compiled Laws is as follows:

> Omissions, errors or defects in form in any assessment list or tax roll, when it can be ascertained therefrom what was intended, may be supplied or corrected by the assessor at any time before the return of the assessment roll to the collector or by the collector at any time after the receipt of such roll by him. When any omission, error or defect has been carried into a delinquent tax list, or any

> error appears in any publication, the list or publication may be amended by the collector and republished as amended; but such publication must be made in the same manner as the original publication and for not less than one week.

The suggestion by appellants that the Territory can be estopped by the action of a county collector (see p. 88 of their Brief) is quite as strong as any of the other numerous arguments with which it is sought to obscure the simple merits of this case. It is so violative of the elementary principles of the law of estoppel that it can receive no further attention here.

As to the assessments for the other years, the reasons for making additional assessments are little, if any, less powerful. In 1894 the assessor put on his list, "93.458 miles main track at $6,500. 607,477.00."

It will be seen that this puts all the railroad in one assessment, for the whole line in the county. There is no indication that any of it is of the character which this court has declared is subject to taxation. In the absence of any showing that the road or some part thereof passed over land which was private property when the grant was made—a showing necessary to the maintenance of a claim of a right to tax—the assessment does not describe taxable property, and the taxable portions, if any, have been omitted from the list.

The same reasoning applies to the assessments for 1895 and 1896, which are in the following language:

> Cross ties, rails, fish-plates, spikes, culverts, bridges, depots, turn-tables, side-tracks, buildings and entire superstructure on right of way, 93.7 miles, in Valencia County, at $6,500.00 per mile. $609,050.00.

The additional assessments, as made, furnish within themselves, in their own language, the means of separating

the valid from the invalid portion of the tax claimed. An assessment of property is void, when the valid portion, if any, of the tax can not be separated, but not so where it is separable. This is clearly set forth by this court in two cases—

People *vs.* Railroad Co., 127 U. S. 1.
Santa Clara *vs.* Railroad Co., 118 U. S. 394.

It is urged most curiously by appellants that if the assessment of 93.7 miles of road, as a whole, is to be considered void because it includes two kinds of miles, one over public domain and the other over private property, the first being exempt, the other taxable, then an assessment of 60.7 miles running over private property, is void if it turns out that there are only 55.5 of such miles.

At the first glance there seems to be something in this, but a little examination will show the fallacy. Let us suppose that all the railroad in the county were taxable, and that the assessor put on the list 93.7 miles when there were really only 90 miles in the county. The owner of the road could not escape paying on the 90 miles because he could show that the assessor had put down too many miles on the list.

Just so, the collector, in the present case, listed 60.7 miles of the road running over land held in private ownership when the railroad company acquired its right, all of such road being clearly taxable. He has assessed nothing except taxable property. The proofs show that his estimate is too large and that there are only 55.5 miles of such road. On account of this mistake, certainly the would-be evader of taxes can not be heard to say that the whole assessment is void and he will pay nothing.

As matter of fact, it is interesting to note the real accuracy with which the collector made his figures. The map-making department of the railroad company, with all its resources, has produced a map which will be before the court on the hearing of this case, which shows the mileage through

the grants almost, if not quite, exactly as given by the collector, the reduction of 5.2 miles agreed on, being occasioned by the fact that the Laguna pueblo grant, as confirmed by the land court, is reduced in area below the previous official survey, so as to cut off 5.4 miles of railroad. And yet appellants tell us they can not know how many miles of the road run over these grants.

It is, however, entirely immaterial to the real interests of the would-be evaders of taxes, whether they pay under the original, or under the additional, assessments for 1894, 1895 and 1896. The amount of tax would be exactly the same if it could be held that the original assessments for those years, were sufficient to enable the Territory to collect a tax upon property not described therein, to wit, so much of the line as is held to be subject to taxation. The valuation per mile is the same, and the resulting tax on that portion of the road would, of course, be the same. Under these circumstances, any argument against the validity of the additional assessments for those years, is unworthy of serious consideration. Courts of equity regard substance and not form, and even at law a case will not be reversed where "the result is right although the manner of reaching it may have been wrong."

Decatur Bank *vs.* St. Louis Bank, 21 Wall. 301.
Allis *vs.* Life Insurance Company, 97 U. S. 145.
Gregg *vs.* Moss, 14 Wall. 569.
Cannon *vs.* Pratt, 99 U. S. 623.
Hornbuckle *vs.* Stafford, 111 U. S. 394.

Had the court below held against the Territory as to these assessments, the only result would have been the amendment of the petition so as to put the right to recover on the original assessments; and even should this court now so hold, it would certainly remand the case with directions to permit such amendment. But such a proceeding would be the idlest sort of formality, and should not be resorted to.

SEVENTH.

The Collector had Lawful Authority to Make Additional Assessments in June, 1897.

The appellants argue that while the statute gives the collector power to make on the tax roll additional assessments of omitted property, yet that power ends upon the arrival of the 1st of March, when returns for taxation are to be made, and from that time he is powerless to act until the new roll is delivered to him some time after the 1st of the following August. In other words, if the tax dodger is not discovered until March, he is safe from annoyance on account of his delinquency for five or six or seven months more. There is nothing in the statute which thus limits the authority of the collector. Section 4056 of the Compiled Laws, hereinbefore quoted, clearly contemplates that he shall act whenever he makes the discovery of the omitted property, and there is nothing said about the time; there is no word limiting him to that fraction of the year—often less than half—intervening between the time he receives the tax roll and the first of the following March. The record in this case shows that the tax rolls in 1892 and 1893 were received by the collector in September; in 1894, 1895 and 1896, in October, and in 1897 in September.

The consequences of the artificial and strained construction contended for by the appellants would be so absurd and mischievous—would be so favorable to those who seek to avoid taxation—that no court will adopt it.

EIGHTH.

There was an Opportunity for Appeal from the Additional Assessments.

It is argued by appellants that it was the duty of the collector to notify the parties in interest of his action on the

7th of June, 1897, so that they might take an appeal. This can only be implied from the fact that the statute gives a right of appeal from his action. It does not direct him to give any notice. Under such conditions, the party assessed could undoubtedly take his appeal, within a reasonable time, whenever he learned of the assessment, and actual notice, no matter how or by whom conveyed, will be sufficient. The collector says that he did send notices to the Trust Company and to the receiver (Rec., p. 282); but whether he did or not, they had notice of the collector's action by the intervening petition on June 10, 1897, when it was served (Rec., p. 119), and could then have appealed had they so desired. A meeting of the commissioners for the very purpose of hearing such appeals was by law appointed to be held on the first Monday in July.

But appellants contend that the collector should have notified the purchasers or their assignee, although, at the time he acted, he could not know they were interested parties because the deed to the purchasers, made "as of the date" of June 2, 1892, only five days before he acted, was not placed of record until June 12, 1897, five days after he acted, while the assignee, the Santa Fe Pacific Company did not take the property from the receiver until July 1, 1897, after the intervening petition had been dismissed and an appeal had been taken. It was certainly enough if notice reached the court and its receiver, who had the custody of the property.

The section of the statutes providing for a meeting of the county commissioners to hear appeals from assessments will be found on pages 158–9 of appellants' Brief.

NINTH

The Taxes are Liens on the Property from the Dates of the Levies in the Several Years, Respectively.

Appellants argue that because the property was not assessed until June, 1897, the taxes could not be liens on the property until after that date, and therefore these taxes are not within the terms of the order of confirmation of sale, cannot be a charge upon the property in the hands of the purchasers, and cannot be collected at all.

In other words, if an owner of land by misleading or false returns, or by making no returns at all, succeeds in avoiding taxation for one or more years, and then sells and conveys his property to a third person, no assessment can be made by which the property can be held liable for the back years, and the Territory is remitted to a personal action against the original tax-dodger who may be insolvent or out of existence like the Atlantic and Pacific Company or the receiver Smith. The statement of the proposition shows its absurdity.

Peters *vs.* Myers, 22 Wis. 576-7.

Besides, our statutes clearly show the legislative intent to be different. The evident meaning of section 4056, hereinbefore quoted, which authorizes the collector to make assessments, is to put the taxes on the same footing as though the assessments had been made in the ordinary manner at the proper time. It declares that the taxes—

> "shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided."

One of those purposes is, in the words of section 4057, that the "taxes upon real estate are hereby made a lien thereon from the date of the levy thereof." Unless the taxes on

these additional assessments are held liens on the real estate assessed, from the same date as the taxes on property assessed in the ordinary manner, the obvious intent of the legislature, clearly expressed, will be defeated, and these taxes thus due under additional assessments cannot be held liens at all.

The statute provides, in section 4057, that the taxes shall be liens "from the date of the levy thereof." What is the "levy" of the taxes? Aside from the statutory provisions which show what the legislature considers to be the levy, and to which attention will be called a little later, the ordinary use of language indicates that the assessment, or valuing and listing of property, is not the levy of a tax; nor is the extending on the tax roll of the amounts of taxes apportioned to any person or property, the levy of a tax. The levy of a tax means something different. The taxes of 1892 were levied in that year when the county commissioners acted, and none of them could be levied by any one in 1897.

The ordinary meaning of the word shows the above to be correct, but our legislation puts it beyond all chance of doubt. The county commissioners, who do not make the assessments, by section 4049 of the Compiled Laws are to "make an order approving the assessment roll as revised and corrected by the board and levying the taxes for the year." By section 4021 the county commissioners only are "authorized to levy taxes for the current expense purposes" of the county. Section 4179 provides that "there shall be levied" for territorial purposes a tax of seven mills on each dollar of taxable property. Numerous other legislative expressions might be cited to show that the levy of the taxes, and the assessment of property, are entirely distinct things.

The collector can not levy a tax. No word in our statute gives him any such power

And yet appellants would have the court believe that the taxes were levied, if they exist at all, only when the col-

lector acted in June, 1897, and that the lien can not relate back to the date when the county commissioners made the only levy authorized and permitted by law.

The sections of the statutes above referred to are as follows:

4057. Every tax levied according to the provisions of this act shall have the force and effect of a judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon from the date of the levy thereof, and taxes properly and lawfully assessed due from any person upon personal property shall not be satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof. The tax list and warrants hereinbefore provided for shall have the force and ~~and~~ effect of an execution against the person or property assessed.

4049. The board of county commissioners at their June session, or at any special session subsequent thereto, and prior to the first day of September, shall make an order approving the assessment roll as revised and corrected by the board, and levying the taxes for the year, for territorial, county and school purposes, as provided by law; which order shall be entered of record in their proceedings, and indorsed upon the assessment roll under the seal of said board, and the hand of the clerk thereof.

4021. The county commissioners of the several counties of the Territory are hereby authorized to levy taxes for the current expense purposes for the year 1898 not to exceed four mills on the dollar, and annually thereafter not to exceed three and one-half mills on the dollar, upon the assessed value of all taxable property.

4179. For the territorial purposes of the forty-ninth fiscal year there shall be levied during the forty-eighth fiscal year, upon each dollar of taxable property, the following tax: Seven mills on the dollar.

For the territorial purposes of the fiftieth fiscal year there shall be levied during the forty-ninth

> fiscal year, upon each dollar of taxable property in the Territory, the following tax: Seven mills on the dollar. Provided, That the territorial treasurer shall distribute the cash product of the tax levy of each fiscal year in proportion that each appropriation bears to the total appropriation.

It being clear that the taxes for the several years were liens from the respective dates of the levies in those years, it follows that they are to be treated as having become delinquent at the same time the other taxes for such years became delinquent, and interest must be computed on them from such times in accordance with the terms of the statute. A Minnesota case is urged by appellants against this contention; but an examination of the case will show that the views of the court are in harmony with what the Territory here contends for. The following quotation will show this:

> Had the legislature the right, in the case of the assessment of taxes for past years, to include in and add to these taxes interest from the date when they would have become delinquent if they had been levied in the proper year? We think not. To render a person chargeable with interest there must be a promise, express or implied, to pay it, or some default of duty on his part in not sooner paying the money. Sibley *vs.* County of Pine, 31 Minn. 201 (17 N. W. Rep. 337). In a case like the present there is neither. If the law required a land owner to list his property for taxation, his failure to do so whereby it escaped payment of the tax at the proper time, would constitute such a default of duty as would justify charging him with interest for the time during which the public was deprived of the use of the money. Or if the amount of the tax had been ascertained, so that he had an opportunity to pay it, but instead of doing so saw fit to defeat its present collection by interposing an objection on the ground of some defect or irregularity in the proceedings, and a reassessment thereby became necessary, we can see how it might be urged that he could be charged

with interest during the time that the collection of the tax was postponed, for the tax payer himself would be in a sense responsible for the delay. But where the land has been entirely omitted from the aasessment rolls the owner is not in default. He is not required to list his land. The neglect or omission is wholly that of the public officer. He has never had an opportunity to pay the tax, for the amount of it has never been ascertained. If, under such circumstances, in the absence of any default on his part, the legislature can impose interest retrospectively, there is no reason why it might not also impose certain penalties for the non-payment of the tax, for both stand, in this respect, on the same footing. Both are in the nature of damages for a default of legal duties. The only difference is that one is in its nature compensatory, while the other is punitive. The effect of adding this back interest to the amount of the tax, in the absence of any default on the part of the owner, is to make his taxes that much larger than those of his neighbors on property of the same value. This, in our judgment, would be in violation of the principle of equality of taxation enjoined by the constitution. This provision of the statute we therefore hold invalid.

Redwood *vs.* Land Co., 40 Minn. 522–3.

This case has been affirmed by this court.

It will be seen that the court distinctly approves of the exaction of interest, where there is any default of duty on the part of the land owner. Here there is certainly such default, and there is nothing to be discovered in the history of this litigation which entitles the railroad to any tender consideration. The Territory ought to recover every cent which the statute will permit. While statutes as to taxation must be strictly complied with to fix burdens on the property of the citizen, yet no liberal construction of such statutes can properly be made in order to favor the owner of property who is in default, and seeks by every possible device to evade his just share of taxation.

TENTH.

Congress Never Granted any Right of Way Through the Spanish Grants Mentioned in the Record and Decree.

Fifty-two pages of appellants' "Brief" are occupied with an attempt to convince the court that these grants must be, for the purposes of this case, treated as having been public domain. No attempt will here be made to follow the details of the argument of appellants. A brief, plain statement of the facts will be sufficient

Of these grants, some had been confirmed by Congress prior to the date of the act creating the Atlantic and Pacific Railroad Company in 1866. All of the others have been confirmed by the court of private land claims as titles which were complete and perfect at the time of the cession of the country to the United States in 1848, and all of the decisions have become final. At the time of the hearing of this case in the district court, appeals were pending in this court from the confirmations by the court of private land claims, of two of these grants (Rec., p. 227), but since that time this court has affirmed the decrees.

By the act of 1866, Congress did not grant a right of way through any specific land, but only through the public domain. That grant gave certainly nothing through the lands already confirmed by Congress, thus declared not to be parts of the public domain. Whatever may have been the previous title, whether perfect, imperfect or worthless, Congress made a good title from the date of its action.

By the confirmation of all the others as perfect titles, in the court created for the purpose, our government has authoritatively declared that it never had any title to the land embraced within them. In other words, that land has always been private property since we acquired the country in 1848.

Appellants attempt to argue that the grant of the right of way to the railroad company over the public domain by the second section of the act of Congress of 1866, gave the company a right of way not only over the public domain but through the various private land grants in Valencia County, and although the court of private land claims may have held those titles to be perfect, yet the railroad company is protected in its absolute property by the provisions of the fourteenth section of the act of Congress creating the court of private land claims, by which it is provided that if any lands decreed to any claimant shall have been sold or granted by the United States to any other person, such title to such other person shall remain valid. The answer to this is so obvious, that it is not easy to understand why the proposition should be seriously set up. An examination of the act of 1866 will disclose the fact that Congress did not undertake to grant any land, except that which was the property of the United States, and as to any other land, it merely gave the company the right of eminent domain by the seventh section of the act. The United States has now, through the tribunal created for that purpose, declared that at no time after 1848, had it any title to any of the land embraced within these grants which have been confirmed by the court of private land claims. Therefore, the grant of a right of way through the public domain in 1866, gave nothing through the lands which the government has never owned.

Attention is called more than once, by appellants, to the fact that the railroad company acquired no land in the grants by purchase or condemnation; but the fact of acquisition of title to such land by adverse possession under the seventh section of the act of 1866 is carefully ignored. There is no doubt that the only title the railroad company can have to its right of way through these grants, is by possession for more than six years, which bars all claim by the owners.

It is, to say the least, interesting to note that appellants at page 119 of their Brief have the courage in this court to assert that two grants are imperfect, notwithstanding the decision of this court that the titles to those particular grants were perfect.

United States *vs.* Chaves.

Their assertions that the other grants are imperfect, in the face of the decrees of the court of private land claims, are equally interesting and convincing.

A number of questions raised by the assignment of errors, some of which were argued in the court below, are not touched upon in appellants' Brief, and have been, presumably, abandoned. They are, therefore, left unnoticed in the present brief.

Before closing, however, attention should be briefly called to appellants' suggestion that their plea in abatement must be taken as absolutely true, because passed upon by the district court without the taking of proofs. It will be seen that the plea in abatement raises the same questions as had been previously raised by the motion to dismiss, as to which affidavits and counter-affidavits were filed. In the district court, as here (Appellants' Brief, pp. 73–4), counsel stated that the plea in abatement was filed to present in different form the questions raised by the motion to dismiss, and was filed only "out of an abundance of caution." The district court merely followed its previous ruling on the motion as to which it was informed by the affidavits, but, now, on appeal, we are told that we must not look at those affidavits in considering the plea in abatement, but are forced by a technical rule of procedure to take the plea as absolutely

true. This would sacrifice substance to shadow. Discussion seems unnecessary.

It is respectfully submitted that there is no merit in appellants' appeal and that the judgment of the court below would necessarily be affirmed were it not for the cross appeal, which may necessitate changes in that judgment in favor of the Territory.

F. W. CLANCY,
Counsel for Appellee.

SUPREME COURT

OF THE

United States.

OCTOBER TERM, 1901.

Nos. 181 and 182.

THE UNITED STATES TRUST COMPANY
OF NEW YORK, ET AL., Appellants.

VS.

TERRITORY OF NEW MEXICO.

THE TERRITORY OF NEW MEXICO, Appellant,

VS.

THE UNITED STATES TRUST COMPANY
OF NEW YORK, ET. AL.

Counsel for the Territory of New Mexico has re-

ceived printed copies of a "Petition for Re-hearing," which, it is assumed, is about to be filed on behalf of the Trust Company and Receiver, but he is unable to discover therein anything to which he desires to make answer at this time, or anything beyond what has heretofore been urged upon the attention of the court.

Inasmuch, however, as these cases are to be again obtruded upon the court, necessarily consuming some of its time and attention, it is believed there can be no impropriety in offering a suggestion as to the judgment, based alone upon what is contained in the opinion of the court, without re-arguing anything whatever.

One of the questions presented to the court, was as to whether the Territory were not entitled to the statutory interest of twenty-five per centum per annum on delinquent taxes from the dates respectively when each year's taxes become delinquent, the supreme court of New Mexico having held that the provision for that interest was repealed by legislation of 1899. As to such alleged repeal, this court says that it may be "doubtful whether the legislature intended to remove the penalty of twenty-five per cent interest in respect to this property," but, without passing on that point, holds that the owners of the railroad were justified in contesting their liability, that until the identification of the property and a determination of the amount of taxes, it would be inequitable to charge penalties for non-payment, and that, therefore, there was no error in refusing interest prior to the decree. Counsel has no desire to question the fairness or equity of this

holding, but suggests, if it be true that the legislature in 1899 did not intend to abolish the twenty-five per cent on taxes then delinquent, that that interest can properly be charged from the date of the decree which ascertained the amount of the taxes. The reason for refusing to allow such penalty before decree, which the court gives, certainly does not exist after the decree.

F. W. CLANCY,

Counsel for Territory of New Mexico.

No. 182.

Brf. of Clancy for Appellant.

Office Supreme Court U. S.
FILED
OCT 29 1901
JAMES H. McKENNEY,
Clerk.

BRIEF FOR APPELLANT.

Filed Oct 29, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 182.

TERRITORY OF NEW MEXICO, APPELLANT,

vs.

THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

F. W. CLANCY,
Counsel for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 182.

TERRITORY OF NEW MEXICO, APPELLANT,

vs.

THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

STATEMENT OF CASE.

The Territory, claiming a lien for taxes on property then in the custody of the court, on the 10th day of June, 1897, filed its intervening petition, asking primarily that the taxes be declared a lien on the property, and secondarily that the receiver, in whose hands was the property, should be ordered to pay the taxes, with interest, to the collector of taxes for Valencia County. The taxes claimed were on the improvements on the right of way of the Atlantic and Pacific Railroad Company, where the same runs over what was public domain when the right of way was granted to said company, thirty-three miles in length, valued at $6,500 per mile, making $214,500; on like improvements on the said right of way where it runs over land which was held in private ownership at the time of the grant to the railroad company, 60.7 miles, at same value per mile, making $394,550; and on improvements at eight stations valued at different amounts for different years.

The petition set out that this property had been omitted from assessment for a series of years from 1892 to 1896, and that the collector had, after the tax list for 1896 was delivered to him, listed, valued and assessed the property and entered such assessment on said tax list. The valuation, the rate of tax levied, and amount of taxes, for each year, were severally set out.

On the 23d of June, 1897, the United States Trust Company, complainant in the foreclosure case, and the receiver in whose custody the property then was, filed their verified pleas, which, with accompanying exhibits, cover pages 58 to 103, both inclusive, of the printed record.

From this great mass of words we may extract the admission, made carefully, and repeated five different times:

> "That about fifty-eight miles of said right of way in said county and territory was and is through land which was not government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress."

This truthful admission appellants have struggled hard to get away from, but without success. Their attempt to do so will be found set out in the affidavit of their learned counsel at pages 111 and 112 of the printed record. On page 112 he says that he made the admission "simply for the purpose of raising the legal questions to be presented by the pleas," and not as an admission of fact. The ingenuity of man can not find in the pleas any "legal question" to the raising of which this admission was necessary.

The pleas also set up objections to the assessments, and the pendency of another intervening petition in another case, by another petitioner, the collector of Valencia County, asking for taxes of 1892 and 1893 on the basis of earlier, defective and invalid assessments.

The district court dismissed the intervening petition with-

out passing on the pleas. The case was successively appealed to the supreme court of New Mexico, and to this court, and was here argued in 1898. This court passed upon the objections to the validity of the assessments, favorably to the Territory, held that the right of way over the land admitted not to have been public domain, was subject to taxation, and remanded the case for further proceedings in accordance with its opinion.

After the case was remanded to the district court the defendants were permitted to file motions to dismiss while the original pleas in bar were still pending and undisposed of; were then given leave to withdraw those pleas and file a plea in abatement; were then permitted to file a demurrer and afterward pleas in bar, all of which were denied, overruled or held insufficient. Finally the defendants filed an answer to the petition and the case was submitted to the court upon the petition, answer, an agreed statement of facts, and the files and records of the case.

The district court entered a judgment in favor of the Territory for the amount of tax due on 55.5 miles of railroad, arriving at that number from the agreed statement of facts, at a valuation of $6,500 per mile, for the amounts claimed for each year respectively, except that certain levies made to pay judgments against the county were not allowed. The court refused to allow the statutory penalty for failure to make returns of the property for taxation, and refused to allow the statutory interest of 25 per centum per annum on delinquent taxes, but did allow 6 per cent. interest thereon from the date in each year when the tax became delinquent.

Both sides appealed to the supreme court of New Mexico, and that court affirmed the decree with some modifications. It refused to allow any interest on the delinquent taxes, and restored the amounts of the judgment levies. Both sides then appealed to this court.

The Territory has made the following—

ASSIGNMENT OF ERRORS.

In the Supreme Court of the United States.
October Term, 1900.

TERRITORY OF NEW MEXICO, *Appellant*,
vs.
THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

Now comes the said Territory of New Mexico and says that there is manifest error in the record and decree of the court below in this cause, and assigns and specifies as error the following:

1. The courts below erred in refusing to hold that plaintiff was entitled to recover taxes on 60.7 miles of railroad.

2. The courts below erred in refusing to hold that defendants were estopped from denying that 58 miles of the railroad were liable to taxation.

3. The courts below erred in refusing to hold that the Territory was entitled to recover interest upon the delinquent taxes at the rate of twenty-five per centum per annum.

4. The courts below erred in refusing to hold that the judgment should bear interest at the rate of twenty-five per centum per annum.

5. The courts below erred in refusing to hold that the Territory was entitled to recover the statutory penalty of twenty-five per centum of the total amount of taxes for each of the years from 1893 to 1896, both inclusive, for failure to make returns for the purposes of taxation, of the property upon which the taxes were due.

Wherefore this appellant prays that the decree and judgment of the supreme court of the Territory of New Mexico be so modified and changed as to correct the errors hereby assigned and complained of, and that this cause be remanded with direction to the supreme court of the territory to render such modified and corrected decree and to award execution thereupon.

F. W. CLANCY,
Counsel for Appellant.

POINTS AND AUTHORITIES.

FIRST.

All that the Court below should have Done was to Ascertain, upon the already Admitted Facts, the Amount of Taxes Due and enter Judgment Therefor.

As has already been stated, the additional assessments were made by the collector upon 60.7 miles of road, which ran over land held in private ownership at the time of the making of the grant. No appeal was ever taken from these assessments as permitted by law, although the record shows that there was ample opportunity for such appeal and the owners of the property should be held to be bound by those assessments, including the valuation put upon the property. The record contained all of the necessary information for the ascertainment of the amount of tax for each year, and it was mere matter of computation to fix the sum.

In any event, it is clear that the five times repeated admission in the pleas sworn to by the solicitor for defendants in 1897—

> "that about 58 miles of said right of way in said county and territory was and is through land which

> was not government land, but which belonged to private individuals or corporations and was acquired by the railroad company under and through the right conferred upon it by said act of Congress,"

estopped defendants to raise the question as to the amount and character of that part of the road.

> Davis *vs.* Wakelee, 156 U. S. 689.
> Railway Company *vs.* McCarthy, 96 U. S. 268.

The most favorable view of the record as it stood when the case was remanded, which could be indulged in favor of appellants, was to compute the amount of tax due on the 58 miles they had admitted.

It may be said that the court below did in effect seek to do just what is here contended for, and there can be but little doubt that the end which the judge of that court had in view was merely to find out the actual number of miles of road of the kind which this court had declared subject to taxation, and to enter judgment for the taxes due thereon at the valuation fixed by the additional assessments; and that, in permitting the appellants to encumber the record with a large number of things like motions to dismiss, demurrers, pleas in abatement, etc., he never lost sight of the main object which he had in view, and that everything which stood in the way was brushed aside before the final hearing.

Upon the final hearing the court found that there were only 55.5 miles of the line of the road subject to taxation. In view of the finding of the supreme court of New Mexico, there can be no doubt that this is absolutely true; but in a case where every possible technical advantage is sought by parties clearly liable for some amount of tax, the court should not hesitate to enforce every possible rule against such parties in favor of the Territory to which the latter can be entitled, whether technical or otherwise; and it is a well-established rule that parties who fail to appeal from assess-

ments when an appeal is provided by statute, are thereafter bound by such assessments, and can not be heard to dispute their correctness in a court of law. Strict enforcement of this rule would show the Territory entitled to recover taxes on 60.7 miles of road. Moreover, at the instance of these appellants, this court has passed upon the sufficiency and validity of the assessments, and in favor of the Territory. If it is said that other and different objections are now urged against the assessments from those which were presented on the former appeal, the answer is that any such objections might have been then presented, and that the declaration by this court of the validity of the assessments is a final adjudication which must be considered as binding.

SECOND.

The Territory is Entitled to Recover Twenty-five per cent Interest on the Taxes.

In the district court it was properly held that the taxes were to be treated as delinquent in each of the years respectively for which they were levied from the dates fixed by law (Rec., p. 293), but interest was allowed from those dates only at the rate of 6 per cent per annum instead of at the statutory rate fixed by section 4066 of the Compiled Laws, at 25 per cent per annum. It is difficult to see why interest was allowed at the rate of 6 per cent unless it was upon some idea of its being harsh and inequitable to apply the statutory rate, or unless the court had in mind the fact of the legislation of 1899 on this subject. As to the first of these surmises there is nothing to be said. If the statute fixes a rate, and is applicable, the court has no discretion. As to the other, it is insisted that the legislation referred to can not properly have any such effect. The supreme court

of the Territory, however, considered that that legislation had the effect of wiping out all interest on delinquent taxes, so that it now becomes necessary briefly to review what was done by the legislature in 1899.

Section 4066 of the Compiled Laws is as follows:

> On the first day of January in each year half of the unpaid taxes for the year past, and on the first day of July in each year, the remaining half of the unpaid taxes for the year past, shall become delinquent, and shall draw interest at the rate of twenty-five per cent per annum, but the collector shall continue to receive payments of the same after the first day of January and July until the day of the sale.

In 1899 an act in relation to the assessment and collection of taxes was passed, of which the tenth section reads as follows:

> Sec. 10. That section 4066 of the Compiled Laws of 1897 be amended so that the same shall read as follows:
>
> "On the first day of January in each year, half of the unpaid taxes for the year last past and on the first day of July in each year the remaining half of the unpaid taxes for the year last past shall become delinquent, and there shall be added on the second day of January and July, one per cent. of the amount of such delinquent taxes as a penalty for non-payment. And unless said taxes shall be paid on or before the first day of the following month, the collector shall add an additional penalty of four per cent of the amount of such delinquent taxes, and upon the happening of the first delinquency above provided for, the collector shall immediately notify the delinquent taxpayer in writing, either personally or by mail, of such delinquency, and of the fact that one per cent penalty has been added to his tax, giving the amount then due, and that unless said taxes and penalty be paid before the first day of the following month, an additional penalty of four per cent will then be added, and in no case shall such penalty be released, abated, rebated, or reduced by

> any person, but it shall have the full force and effect of the original tax, and become part of the same, and any failure on the part of the collector to add such penalty and collect the same shall subject him to removal from office, and to pay double the amount of such penalty; one-half thereof to the county current expense fund, and one-half to the territorial interest fund, which amounts shall be collected from him and the sureties on his bond, and he may be removed from office therefor by the board of county commissioners. Provided that proof of the giving or the mailing by the collector of notice of delinquency mentioned in this section or the proof of the receipt of such notice by the taxpayers shall not be necessary to the imposition and collection of the penalties hereby created.

It is obvious that the effect of section 10 of the act of 1899 was to do away with the twenty-five per cent rate of interest on delinquent taxes, at least for the future. It is not clear that there was any intention by this amendment of section 4066 to wipe out the interest which had already accrued on delinquent taxes. In saying this there is no intention to ignore the very respectable authorities which hold that a statute repealing an earlier law imposing a penalty, without any reservation as to penalties already accrued, will operate to destroy all right to the recovery of such penalties even in cases pending at the time of the repeal; nor the fact that there are cases which hold that interest on taxes is to be considered in the light of a penalty.

These adjudications should not be held applicable in the present case for the reason that interest, which is properly nothing but a payment for the use of money, ought not to be considered as a penalty, and even if it can be so classed, as a general proposition, this must give way to clearly expressed legislative intent. It is clear that the legislature, in enacting laws with regard to taxation in New Mexico, has had in mind as distinct and separate things, penalties and interest, and do not use the one word for the other. It was

provided by section 4066 that delinquent taxes should draw interest. While there may have been in the enactment of this statute and the fixing of a rate of twenty-five per cent per annum, some idea of accelerating payment of taxes by the imposition of this burden, yet the main idea was to give the public treasury compensation for the great and varied increase of expense occasioned by such delinquencies. It is to be borne in mind also that when this section was originally enacted in 1882 the ruling rate of interest in New Mexico was not greatly below that fixed on these delinquent taxes. Money was worth much more at that time than it is at present.

The legislature, however, has elsewhere provided for penalties by that name, as will be seen by reference to sections 4035, 4036 and 4060 of the Compiled Laws, and by section 11 of the same act of 1899, in addition to what is said in section 10 above quoted. There can be no doubt that the legislature has not at any time considered interest on delinquent taxes and penalties as being one and the same thing.

The statutes referred to are as follows:

> Sec. 4035. If any person, liable to taxation, shall fail to render a true list of his property, as required by the preceding three sections, the assessor shall make out a list of the property of such person, and its value, according to the best information he can obtain; and such person shall be liable, in addition to the tax so assessed, to the penalty of twenty-five per cent thereof, which shall be assessed and collected as a part of the taxes of such person.
>
> Sec. 4036. If any person liable to taxation shall knowingly make a false list of his property subject to taxation in this Territory, for the purpose of avoiding any proper assessments of taxes, he shall be liable to a penalty of twenty-five per cent, to be added to the amount of the taxes assessed upon the true amount and value of his property, and shall also be deemed guilty of perjury.
>
> Sec. 4060. The officer collecting taxes, so certified

into another county, shall, in addition to the penalties provided by law on delinquent taxes, assess and collect the further penalty of ten per cent on the amount of such taxes, and when collected shall transmit the amount to the collector of the county where such taxes were levied, less the said penalty of ten per cent. If in his opinion such taxes can not be collected, the officer shall return the abstract with his certificate thereon that the taxes are uncollectible.

Sec. 4067. The collector shall, in all cases, make out and deliver to the taxpayer a receipt, stating the time of payment, the description and assessed value of each parcel of real estate and the assessed value of personal property; the amount of each kind of tax, the interest on each and costs, if any, giving a separate receipt for each year; and he shall make the proper entries of such payment on the books of his office.

Sec. 11. That section 4067 of the Compiled Laws of 1897 be amended by striking out the word "interest" therein and inserting the word "penalty," as provided in the preceding section.

Laws of 1899, p. 51.

Were there any doubt as to the intention of the legislature not to favor delinquent taxpayers by remitting the accumulated interest, that doubt would be removed by an examination of section 34 of the act of 1899, which reads as follows:

Sec. 34. All acts or parts of acts in conflict herewith, either general or special, are hereby repealed, and this act shall take effect and be in force from and after its passage: Provided, that the provisions of this act shall not affect or be applicable to taxes heretofore assessed, or which are delinquent at the date of the approval hereof, except that suit for the same may be brought and judgments thereon rendered in the manner provided by this act, but the validity of such delinquent taxes shall be determined

by the law in force at the time of making the assessment therefor. The time for the payment of all taxes now delinquent is hereby extended until May 1, 1899, and when the same may be in litigation at the date of the passage of this act, until such litigation shall be determined.

There can be no reasonable doubt that the effect of the proviso in the above quoted section, is to leave all taxes already assessed or delinquent in the condition in which the legislature found them at the date of the passage of the act, and it would be a very artificial and strained construction which should hold that the legislature did not intend to preserve the right to recover interest on the delinquent taxes. It is true that the section provides for an extension of time for the payment of delinquent taxes until May 1, 1899, but there is no hint in this extension of time that any interest or penalty which had accrued should be remitted. The only effect of such extension would be to make it impossible for personal property to be distrained, or real estate sold by the collector, or any suit to be brought for the collection of taxes, until after the expiration of the time.

The further action of the legislature only a few days later shows conclusively that this was the legislative intent. The act being on the same subject and passed at so nearly the same time, must certainly be construed with the earlier one as *in pari materia*, and effect should be given to it unless clearly inconsistent with the first statute, as though both had been enacted at the same time.

Sutherland on Statutory Construction, Sections 283, 288.

The second enactment of 1899 will be found at page 106 of the Session Laws, and the first section of that act reads as follows:

Section 1. That all accrued penalties and interest upon taxes now or heretofore in this year delinquent,

shall be remitted upon all such taxes which have been or shall be paid on or before the first day of July, A. D. 1899. *Provided, however*, that in all cases where taxes are now the subject of litigation the time for such payment as aforesaid is extended only to the first day of July, 1899, and if not paid on or before such first day of July, no abatement of interest or penalties shall thereafter be made.

From the language of this section it is perfectly clear that the legislature considered that it had in no way wiped out accrued penalties and interest on delinquent taxes, as it offered to remit the same provided that payment of the taxes were made on or before the first day of July. This was like an offer of compromise with the delinquent which would be effective only if accepted and acted on within a limited time, and it was distinctly pointed out that if not acted on by the first day of July no abatement of the accrued interest or penalties would be made. Taking the two acts together, all possible doubt as to the legislative intent is certainly removed, and the legislative intent is what must prevail so long as the legislature does not transcend the limitations imposed by the organic law.

The conclusion is irresistible that the 25 per cent on delinquent taxes was preserved unless the delinquents made payment between the 16th of March and the 1st of July. In the present case the delinquent owners of the railroad property did not see fit to accept what was offered by the Territory, and they have at no time during the prosecution of this litigation, either in the courts below or in their brief filed in case No. 181, made any claim under the legislation of 1899. Their counsel evidently does not consider the question as in any manner affected by that legislation, as he rests his claim as to the interest upon the ground that the taxes should not be considered as delinquent until the first of January after the additional assessments were made in June, 1897.

THIRD.

The Territory is Entitled to Recover the Penalty of Twenty-five per cent of the Amount of the Taxes for Failure to Make Returns.

It appears from the Record that no returns of the property sought to be taxed were made by any one for the years 1893, 1894, 1895 and 1896. Section 4035 of the Compiled Laws reads as follows:

> If any person, liable to taxation, shall fail to render a true list of his property as required by the preceding three sections, the assessor shall make out a list of the property of such person, and its value, according to the best information he can obtain; and such person shall be liable, in addition to the tax so assessed, to the penalty of twenty-five per cent thereof, which shall be assessed and collected as a part of the taxes of such person.

It will be observed that this section of the statute declares a liability in addition to the tax for a penalty of 25 per cent of the amount of the tax. This is a penalty arising by operation of law and can not be made dependent for its existence or enforcement upon the action or non-action of an assessor or collector. It is a punishment for a failure to comply with the law of the Territory, and the Territory is entitled to recover it in a suit of this kind, no matter what may have been done or not done by the assessing or collecting officers.

It is respectfully submitted that the judgment of the court below should be set aside, or at least so changed as to give the Territory that to which it is entitled as hereinbefore set forth.

F. W. CLANCY,
Counsel for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

THE TERRITORY OF NEW MEXICO,
APPELLANT,

v.

UNITED STATES TRUST COMPANY OF NEW YORK AND C. W. SMITH,
APPELLEES.

No. 182.

BRIEF OF APPELLEES.

Statement.

For a statement of the facts in this case, appellees refer to the statement of facts contained in their brief filed in case No. 181.

Points and Authorities.

FIRST.

I.

The action of the collector of Valencia county, on June 7, 1897, in listing upon the tax list of 1896 the property in

controversy, and levying taxes against it, constituted no notice to the owners of the property, and placed upon them no requirement of appealing to the Board of County Commissioners, until they were notified of the action by the collector. (See tax laws of New Mexico in appendix to brief of appellants in 181, and in appendix to this brief.)

The court will remember that, at the time of this action, a deed had been executed to the purchasers, under the judicial sale made on the 3d day of May 1897, of the property involved. The court will also remember that, at the confirmation of the sale of this property on May 4th, the solicitor for the Territory appeared before the court for the purpose of having certain provisions entered in the decree of confirmation. The client of the learned solicitor then acquired full and complete knowledge of the fact that the property had been sold to Messrs. Walker, Morawetz and Hays, and that by the decree of confirmation the purchasers had become invested with the full equitable title, with a right to a deed conveying the full legal title upon demand. With this knowledge the learned solicitor, in directing the collector as to whom notices of the assessment should be sent, omitted the names of the actual owners (Tr. p. 282). By the knowledge acquired by the agent of the county, it was at least put upon enquiry as to whether the deed was executed or not.

If the assessment in controversy had been made upon the assessment roll, or upon the tax list, for 1897, the owners of the property would doubtless have been required to take notice of the fact; but having been made upon the tax list of the previous year, there was, and is, nothing in the scheme of taxation provided by the revenue laws of New Mexico which required the purchasers of the property assessed to take notice of this action. The collector either purposely or otherwise omitted to give any date of these

assessments on the tax rolls of 1896, showing the date of making these assessments, in order, we assume, that it might appear that they had been made in 1896, and that the taxes were delinquent on January 1, 1897, more than five months previous to their assessment. Without notice of this action there was no duty on the part of the owners of the property to appeal from the assessments made prior to the time the intervening petition was filed.

II.

The County Board of Equalization had no power or jurisdiction to determine what part of this property that was assessed by the collector was exempt or not exempt. The determination of the collector upon this question was only *prima facie* correct. No appeal could have been taken to the Board of County Commissioners from such determination. The court will remember that when the collector acts the appeal from his action is to the County Board and not to the Board of Equalization; but even if an appeal did lie from his action to the Board of Equalization, such board would have had no jurisdiction over the subject-matter of determining how many miles of the right of way of the railroad in controversy was acquired by the railroad company over land held in private ownership. This entire question is very fully and forcibly discussed by the Supreme Court of Oregon in the case of Portland University *v.* Multnomah County (31 Or. 498), under statutes concerning the powers of Boards of Equalization like the one under consideration.

III.

Appellant asserts in its brief that because of the fact that the receiver and the United States Trust Company, in the pleas originally filed to the intervening petition, admitted

that there were fifty-eight miles of the right of way, through land acquired from private individuals, such admissions constituted an estoppel, although no judicial action was taken upon such admission; no one misled by it, and the pleas containing the admission were subsequently withdrawn.

It is hard to conceive upon what principle this doctrine of estoppel is urged. Certainly the decisions of this court, cited on page 6 of the brief, do not lend any support to the position of appellant. This admission in the pleas was, at most, mere surplusage, as the pleas could not put in issue any fact in the intervening petition. These pleas were set down for argument, but before any argument was heard upon them they were withdrawn. If an argument had been had upon them every fact contained in the intervening petition would have been admitted as true for the purposes of the pleas.

United States *v.* California, etc., Land Co., 148 U. S. 40.

Under the correct practice, as determined by this court, any admission in these pleas could not be used for any purpose by either party, except upon the hearing of the pleas, either upon argument or upon issue joined.

Farley *v.* Kittson, 120 U. S. 303.

United States *v.* California, etc., Land Co., *supra*.

IV.

It will be seen, by reference to that part of the agreed statement of facts concerning this matter appearing on page 284 of the transcript, that the admission made in the pleas was made without any knowledge on the part of the solicitors making the same with reference to the actual facts in the case, and, as no one was deceived or misled by this admission, it cannot seriously be contended that such admission amounts to an estoppel.

SECOND.

I.

The Territory was not entitled to recover any interest upon the taxes alleged to have been levied.

The interest fixed by the statute quoted was and is in the nature of a penalty.

Litchfield *v.* County of Webster, 101 U. S. 779.

Cooley on Taxation (2d ed.), pp. 456–7.

II.

It could not possibly attach in any event until the taxes themselves were levied. While the property was being administered in the hands of the court as an insolvent property, interest could not be allowed or collected on account of the failure to pay any taxes.

Thomas *v.* Western Car Co., 149 U. S. 95.

Grand Trunk Ry. Co. *v.* Central Vermont Ry. Co., 90 Fed. 163.

Same case, 91 Fed. 570.

III.

The tax collector in making the assessments in controversy, placed the same on the tax list in a lump sum, and extended against such lump sum the taxes assessed by him. (See Exhibit 6, Tr. pp. 183–185; Exhibit 8, pp. 190–192; Exhibit 10, pp. 196–199; Exhibit 12, pp. 201–205; Exhibit 14, pp. 208–211.) The gross assessment upon the tax list included property confessedly exempt, even though there was property included in it not exempt. The taxes being

levied in each year upon a gross assessed value of exempt and non-exempt property were on their face illegal.

People *v.* C. P. R.R. Co., 127 U. S. 1.

County of Santa Clara *v.* C. P. R.R. Co., 118 U. S. 394.

The owners of the property were obviously not required to pay the total taxes levied against this gross assessment. There could be no default on the part of such owners until the tax list had been corrected, so as to show the amount of taxes due upon the property that was taxable. If it were admitted that the owners of the property should have looked to the typewritten pages attached to the tax list to find out at what sum the property not exempt from taxation was assessed, and then figure up the taxes and tender the same, such admission would not change the result. The assessment of the improvements upon sixty miles of the right of way as non-exempt, included, according to the judgment of the two courts below, nearly five miles of exempt property, or a valuation of some $33,000 not assessable or taxable. Therefore, the assessment and the levy made were each, in any view of the case, illegal, and hence no interest could be charged for a failure to pay such illegal taxes until the actual amount of the valid tax was in some way ascertained. Until the amount of legal taxes was definitely ascertained, the owners of this property had no opportunity of paying such taxes, and were therefore not in default in not paying, hence the claim for back interest is not a valid one. See, as directly in point, the following cases:

L. S. & M. R. Co. *v.* People, 46 Mich. 193–211.

County of Redwood *v.* Winona, etc., Land Co., 40 Minn. 573.

IV.

Sections 10 and 34, of the session laws of New Mexico of 1899, quoted in appellant's brief, at pages 8 and 9 and 11 and 12, show that the legislature repealed the law authorizing this interest, and extended the time to pay these taxes until the end of the litigation, which was pending at the time of the passage of the act. The extension of the time for the payment destroyed any penalty imposed for non-payment. This act having taken effect and been in force prior to the enactment of the further act in 1899, quoted on pages 12 and 13 of appellant's brief, rendered such further act inoperative.

State *v.* Mayor, etc., Jersey City, 37 N. J. L. 39.
Snell *v.* Campbell Co., 24 Fed. 880.
Andering *v.* Levy, 57 Miss. 52, 57, 58.

In this connection we call attention to that portion of the opinion of the Supreme Court of New Mexico, which was rendered in this case, construing these statutes, on pages 329 to 331 of the transcript.

THIRD.

I.

It is pretty difficult to discover upon what theory the learned counsel for appellant claims a right to a penalty of twenty-five per cent. (25%) for failure to make returns, as set forth on page 14 of the brief.

In the first place, there is no allegation in the intervening petition covering any such penalty, and the intervening petition does not ask for any such recovery. In the second place, the statute quoted by the learned counsel, on page 14 of the brief, only imposes such penalty when there is a failure to render a list of property subject to taxation by the tax payer, *upon a demand made upon him for such list*, under the provisions of section 2822. (See appendix to brief of appellants in case No. 181, page 157.) There has been no suggestion, either by pleading, agreed statement of facts, or otherwise, that any demand was ever made upon any one by the assessor of Valencia county to list the property attempted to be assessed by the collector. While it is admitted in the agreed statement of facts that no return of this property was made by the railroad company after the year 1892, such admission falls far short of showing any default upon its part, as it could only be in default upon a demand made upon it by the assessor.

II.

The statute fixing the penalty requires such penalty to be assessed and collected as a part of the taxes. There was no penalty assessed, according to any statement in the intervening petition. In fact, the statute authorizing the

assessment of omitted property does not provide for the assessment of penalties or interest, but simply for the assessment of arrearages of taxes.

In conclusion, we desire to call the attention of the court to the fact that until the adoption by the legislature of New Mexico of section 25, chapter 22, of the laws of 1899 (which imposes no penalty for its breach) there was no duty imposed upon a tax payer to either return his property for assessment in the absence of a demand made upon him by the assessor, or to see that his property was upon the assessment or tax rolls. We call attention to sections 4035, 4036 and 4040, of the Compiled Laws of New Mexico of 1897, which were in force at that time, and shown in the appendix hereto, together with section 25, chapter 22, of the laws of 1899.

All of which is respectfully submitted.

C. N. STERRY,
Solicitor for Appellees.

E. D. KENNA,
ROBERT DUNLAP,
Of Counsel.

APPENDIX.

Sections 4035, 4036, and 4040 of the Compiled Laws of New Mexico of 1897.

Sec. 4035. If any person, liable to taxation, shall fail to render a true list of his property, as required by the preceding three sections, the assessor small make out a list of the property of such person, and its value, according to the best information he can obtain; and such person shall be liable, in addition to the tax so assessed, to the penalty of twenty-five per cent. thereof, which shall be assessed and collected as a part of the taxes of such person.

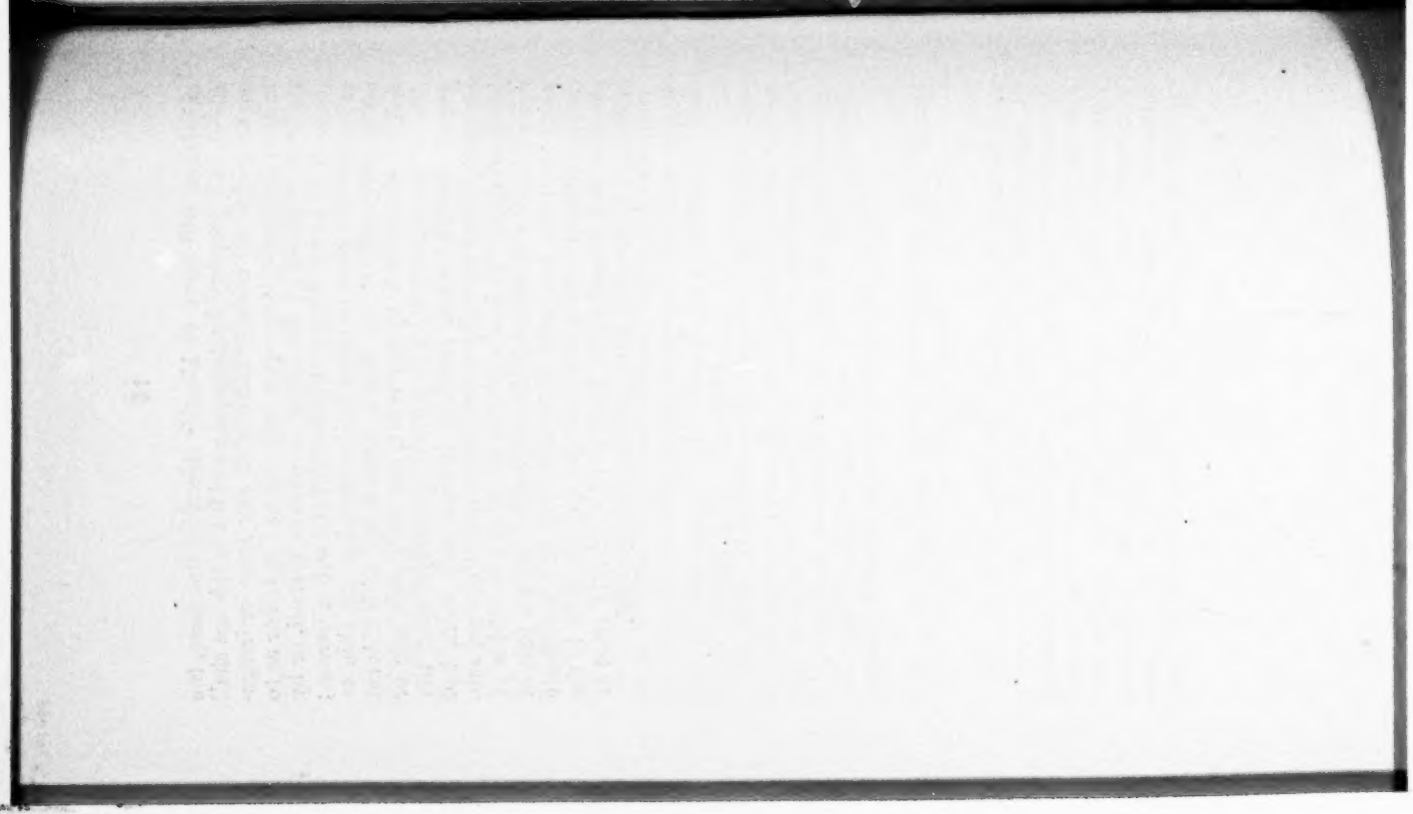
Sec. 4036. If any person liable to taxation shall knowingly make a false list of his property subject to taxation in this territory, for the purpose of avoiding any proper assessments of taxes, he shall be liable to a penalty of twenty-five per cent., to be added to the amount of the taxes assessed upon the true amount and value of his property, and shall also be deemed guilty of perjury.

Sec. 4040. If the owner or claimant of any property, not listed by another person, is absent or unknown, the assessor must make an estimate of the value of such property, and if the name of the absent owner is known to the assessor, the property must be assessed in his name; if unknown, the property must be assessed to, Unknown owners.

Section 25, Chapter 22, of the Laws of New Mexico of 1899, Page 59.

Sec. 25. It is hereby made the duty of every person, firm, or corporation, owning or having any interest, legal or equitable, in any real estate or other property, in this territory, on the first day of March of any year, to see that such property is properly listed for taxation on the assessment roll for such year in the county in which the same is situated; and if such property is described in the assessment roll and delinquent tax list for any year by such de-

scription as will serve to identify (identify) the same, the sale of such property for taxes as provided in this act shall not be void or set aside on account of any error or irregularity in listing the same upon such roll or list either as to the name or names of the owner or owners thereof, or by reason of its being listed in the name of the wrong person; and no bill of review or other action attacking the title to any property sold at tax sale in accordance with this act shall be entertained by any court, nor shall such sale or title be invalidated by any proceedings except upon the ground that the taxes, penalties, interest, and costs, had been paid before the sale, or that the property was not subject to taxation. In case any tract or legal subdivision of real estate, be sold as hereinabove provided, upon a part of which the taxes had been paid, such sale and certificate shall nevertheless vest a complete and perfect title in the purchaser and his assigns to such portion of said tract or subdivision upon which the taxes had not been paid.



Supreme Court of the United States.

Nos. 181 and 182.—October Term, 1901.

181 The United States Trust Company of New York et al., Appellants, vs. The Territory of New Mexico.

182 The Territory of New Mexico, Appellant, vs. The United States Trust Company of New York et al.

Cross Appeals from the Supreme Court of the Territory of New Mexico.

[January 6, 1902.]

On July 16, 1895, the United States Trust Company of New York filed its bill in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, praying foreclosure of a mortgage given by the Atlantic and Pacific Railroad Company. On January 10, 1896, Charles W. Smith was appointed receiver. On April 10, 1896, a decree of foreclosure was entered. The decree provided that the purchaser or purchasers, and his or their successors or assigns, should, as part consideration and purchase price of the property purchased and in addition to the sum bid, pay—

"any indebtedness and obligations or liabilities which shall have been legally contracted or incurred by the receiver before delivery or possession of the property sold, including the receiver's notes or certificates hereinbefore mentioned, and also any indebtedness and liabilities contracted or incurred by said defendant railroad company in the operation of its railroad prior to the appointment of receivers, which are prior in lien to said first mortgage, and which shall not be paid or satisfied out of the income of the property in the hands of the receiver, upon the court adjudging the same to be prior in lien to said mortgage and directing payment thereof, provided that suit be brought for the enforcement of such indebtedness, obligation or liability within the period allowed by any statute of limitations applicable thereto.

* * * * * *

"Any such claim for indebtedness, obligations or liabilities which shall not have been presented in writing to the receiver or

filed with the clerk of this court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the receiver of a notice to the holders of such claims to present the same for allowance. The receiver shall publish such notice at least once a week for the period of six weeks in one or more newspapers published in Albuquerque, New Mexico; Prescott, Arizona, and Los Angeles, California, upon the request of any purchaser or purchasers after delivery of the possession of the property to them, and any such claims, which shall not be so presented or filed within the period of six months after the first publication of such notice, shall not be enforceable against said receiver nor against the property sold nor against the purchaser or purchasers, his or their successors or assigns."

On May 3, 1897, a sale was made under the decree to A. F. Walker, R. Somers Hayes and Victor Morawetz. On May 4 the sale was confirmed. The order of confirmation contained substantially the same provisions respecting payment of obligations as the decree, and added "including also any taxes which may finally be adjudged to be a lien upon the property sold under the decree aforesaid."

According to an affidavit filed in the case this clause was entered at the suggestion of counsel for the Territory, and upon notice in open court of his intention to present a claim for the taxes hereinafter referred to. On June 22, 1897, the purchasers conveyed the property to the Santa Fe Pacific Railroad Company, and on July 1, 1897, the receiver delivered possession of the property. On October 4, 1898, he was by order of the court discharged as receiver. He failed to give the notice required by the decree for the purpose of cutting off claims against the property, and on application of the Santa Fe Pacific Railroad Company, the grantee of the purchasers, on December 19, 1898, an order was entered directing the clerk of the court to publish the notice, and a notice was published that on or before October 23, 1899, all claims against the receiver must be presented or they would be barred. On June 10, 1897, after the confirmation of the sale but while the property was in possession of the receiver, the Territory of New Mexico, by leave, filed an intervening petition, claiming a lien for and payment by the receiver of certain taxes upon part of the railroad property in the county of Valencia. To this petition the trust company and receiver, on June 23, 1897, filed joint and several pleas. On the same day,

without passing upon the sufficiency of the pleas, the court ordered the intervening petition dismissed on the ground that the "matters and things therein set up" were "not sufficient to entitle the said intervening petitioner to the relief sought by its petition." On appeal to the Supreme Court of the Territory this order of dismissal was affirmed. From such decision the Territory appealed to this court, which upon the first hearing affirmed the rulings below, (172 U. S. 171, 186,) but on a petition for rehearing reversed the order and remanded the case for further proceedings. (174 U. S. 545.)

The mandate having been returned and presented to the trial court on August 4, 1899, proceedings were there had which culminated on October 5, 1899, in a finding that the Territory was entitled to a tax lien upon a portion of the railroad property for $74,168.70, and a decree establishing such lien. From this decree both parties appealed to the Supreme Court of the Territory, which, on August 23, 1900, modified the decree by reducing the amount to $61,922.73, and awarding interest at the rate of six per cent per annum from October 5, 1899, the date of the decree in the district court. (62 Pac. Rep. 987.) From this decision both parties have appealed to this court.

A statement of facts agreed to by the parties was filed in the district court, and upon this statement the decree was founded. This agreed statement contains a narrative of facts, transcripts of records and the testimony which certain witnesses would have given if they had been produced and sworn. This statement of facts was incorporated in the record transmitted to the Supreme Court of the Territory, and is the only portion of the record showing the facts presented on the hearing in the district court. After the decision by the Supreme Court of the Territory, both parties having signified an intention to appeal to this court, the Territory applied for a statement of facts in accordance with the act of Congress, of date April 7, 1874, in reference to practice in territorial courts and appeals therefrom, (18 Stat. 27,) which application was resisted by the counsel for the trust company and the receiver on the ground that the case had been tried in the court below upon an agreed statement of facts, whereupon the Supreme Court made this entry of record:

"Being willing and desirous that the respective parties be allowed to get their appeals before the Supreme Court of the United States in such shape as their counsel deem proper, the

court hereby certifies for use upon the appeal of the said The United States Trust Company of New York and C. W. Smith, receiver, that this case was tried in the court below upon an agreed statement of facts, which agreed statement of facts was made part of the record in the district court and part of the record upon appeal to this court, and is to be a part of the record on appeal to the Supreme Court of the United States; that the said agreed statement sets out the facts of this case which were heard or considered by this court upon said appeal, and the same is hereby adopted by this court as its statement of such facts for use upon the appeal aforesaid without here repeating the same.

"And the court further certifies for use upon the appeal of the said Territory of New Mexico, in accordance with the prayer of the said appellant, the following statement of facts."

Following this was a special statement of facts, certified to under the hand of the Chief Justice.

Mr. Justice BREWER delivered the opinion of the Court.

The district court dismissed the intervening petition on the ground that it presented no claim against the property or the parties. The reversal by this court of such order is an adjudication that upon the face of the petition a valid claim was presented, and is conclusive of such *prima facie* validity, not merely against objections which were in fact made but also against those which might have been made. (*Cromwell* v. *County of Sac*, 94 U. S. 351, 352; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610, 618.) We start in this inquiry then with the adjudicated fact that upon the face of the intervening petition was presented a valid claim for the taxes therein specified.

The case was heard in the district court upon an agreed statement of facts, which was thereafter certified by the Supreme Court of the Territory as a statement of facts under the act of April 7, 1874. We have had several occasions to consider the effect of an agreement of the parties as to the facts. See *Wilson, Receiver, &c.* v. *The Merchants' Loan & Trust Co.*, *ante*, ——, and cases cited in the opinion. An agreed statement of facts may be the equivalent of a special verdict or a finding of facts upon which a reviewing court may declare the applicable law if such agreed statement is of the ultimate facts, but if it be merely a recital of testimony or evidential facts, it brings nothing before an appellate court for consideration. The same rule obtains in

cases of appeals from territorial courts under the act of 1874. That act in terms provides that—

"On appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below." (*Stringfellow* v. *Cain*, 99 U. S. 610; *Idaho & Oregon Land Company* v. *Bradbury*, 132 U. S. 509.)

Tested by the various authorities just cited the certified statement of facts is insufficient, and presents nothing for our examination. This disposes of most of the questions discussed by counsel.

When the mandate from this court was filed in the district court, a motion to dismiss and also pleas in abatement and in bar were successively filed, argued and overruled. We shall not attempt to notice in detail the various matters presented in the motion and pleas. It will be sufficient to state our conclusions upon the important questions.

There was no invalidity in the fact of additional assessments. Indeed, the claim in the petition was wholly for taxes based upon additional assessments for prior years, and when this court adjudged that that petition upon its face showed a tax claim against the property, it was an adjudication in favor of the validity of such additional assessments.

The filing of the intervening petition and the final adjudication thereon were in time. It is true the petition was not filed until after the sale had been confirmed and the master's deed executed, and that by the decree of confirmation the receiver was directed to then turn over the property to the purchasers. It may be also conceded as generally true that a retention by a receiver, after the time for the delivery of the property in his hands, is as agent of the purchasers. (*Very* v. *Watkins*, 23 How. 469, 474.) But the filing of the petition, as well as the mandate from this court, was within the time expressly named in the decree, as follows:

"Any such claim for indebtedness, obligations or liabilities which shall not have been presented in writing to the receiver or filed with the clerk of this court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the receiver of a notice to the holders of such claims to present the same for allowance."

Indeed, the petition was filed while the property was still in the hands of the receiver, and that would seem to bring the action of the intervenor within the terms of the first clause of the quotation just made. At any rate everything in the district court, even its final adjudication, was before October 23, 1899, the time fixed in the notice for the cutting off of claims against the property given at the instance of the grantee of the purchasers, to wit, the Santa Fe Pacific Railroad Company. That the receiver had been discharged before such mandate was filed, or final proceedings had, is immaterial, as the grantee of the purchaser (the present owner of the property) had made itself a party to the record by coming in and praying for the publication of a notice to cut off claims.

Neither can the Sante Fe Company claim that it was misled in any way as to its liability for these taxes, for not only by the terms of the decree was the sale to be made subject to any indebtedness that might subsequently be charged against the property prior in lien to that of the mortgages foreclosed, but also on the confirmation of the sale and before it took title from the purchasers at such sale the order specifically included within the obligations which must be assumed any taxes which might "finally be adjudged to be a lien upon the property."

No order was necessary for retaking possession. By the terms of the decree the court, although the actual possession was surrendered, retained a constructive control which it could enforce whenever its orders were not complied with, and the present proceeding was to establish that the property was subject to these taxes. The proceeding was initiated not only when there was a qualified control, but also an actual possession of the property, and no subsequent orders of the court put an end to its jurisdiction to proceed to an inquiry as to the validity of the tax lien. The reversal of the order of dismissal by this court reinstated the proceeding in the trial court as of the date of the order of dismissal. If the decree is not complied with by the present owners of the property, it may then become necessary to order a retaking of possession.

While the description in the intervening petition of the property sought to be subjected to the taxes may be indefinite, the property is sufficiently described in the decree, and it must be assumed that the testimony warranted the description.

These are all the matters we deem it necessary to notice, and are of opinion that in the record, so far as we are at liberty to examine it, is disclosed no error prejudicial to the rights of the appellants.

On its cross appeal the Territory, which had obtained a properly certified statement of facts sufficient for the questions it presents, contends that it was entitled to recover the amount of the tax upon 60.7 miles of road, as fixed by the assessments, whereas the court found that there were only 55.5 miles subject to taxation, and made the award upon the basis of assessments upon that extent of road. It insists that the assessments were conclusive of the amount due because no appeals to correct them were taken, as permitted by law. It further says that in any event the statement made in the pleas and sworn to by the solicitor for the trust company and the receiver, "that about 58 miles of said right of way in said county and Territory was and is through land which was not government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress," should be held conclusive as to the number of miles subject to taxation. The trial court found, as stated, that there were 55.5 miles so subject. This finding was approved by the Supreme Court and is conclusive upon us as to the fact; and if in truth there were only so many miles of road subject to taxation, it would be inequitable to adjudge a greater liability, for that would be enforcing taxes upon property which was not subject to taxation.

Again, it is contended that the Territory was entitled to a 25 per cent penalty under section 4035 of the Compiled Laws of New Mexico, 1897, which reads:

"If any person, liable to taxation, shall fail to render a true list of his property as required by the preceding three sections, the assessor shall make out a list of the property of such person, and its value, according to the best information he can obtain; and such person shall be liable, in addition to the tax so assessed, to the penalty of twenty-five per cent thereof, which shall be assessed and collected as a part of the taxes of such person."

It is enough to say that no such penalty was claimed in the intervening petition. Penalties are not favored in equity, and seldom will a chancellor enforce penalties in favor of a party who

does not ask for them. Again, by the terms of the section, the penalty is to be "assessed and collected as a part of the taxes," and the record shows no assessment of the penalty.

A final contention is in respect to interest. Section 4066 of the Compiled Laws provides:

"On the first day of January in each year half of the unpaid taxes for the year last past, and on the first day of July in each year the remaining half of the unpaid taxes for the year last past, shall become delinquent, and shall draw interest at the rate of twenty-five per cent per annum, but the collector shall continue to receive payments of the same after the first day of January and July until the day of sale."

The district court ignored the provisions of this section, and allowed interest at the rate of 6 per cent per annum from the times the taxes became delinquent in the several years. The Supreme Court modified this, and allowed interest only from October 5, 1899, the date of the decision in the district court. In 1899 the legislature passed a new statute in reference to taxes. (Chap. 22, p. 47, Laws of New Mexico, 1899.) By section 10 of that act section 4066 of the Compiled Laws was in terms amended, and in lieu of the 25 per cent different and graded penalties were enforced. By section 34 of that act "the time for the payment of all taxes now delinquent is hereby extended to May 1, 1899, and when the same may be in litigation at the date of the passage of this act until such litigation be determined." Other provisions of this section, taken in connection with a statute passed at the same session of the legislature, (chap. 52, p. 106, Laws 1899,) referred to by the Supreme Court of the Territory in its opinion, may render it doubtful whether the legislature intended to remove the penalty of 25 per cent interest in respect to this property; for such interest in tax proceedings is in the nature of a penalty. Yet, irrespective of this statutory question, we are of opinion that there was no error in refusing to enforce this charge against the property. The assessment was made in gross upon 60.7 miles of road, without specification of the particular miles other than that they were "embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company." The finding of the court shows that no such length of railroad was subject to taxation, but only 55.5 miles, and those were specified and described. The

owners of the road were, therefore, justified in contesting their liability to such assessment and taxation in gross, and until there was an identification of the property subject to taxation, and a determination of the amount of taxes due, it would be inequitable to charge penalties for non-payment. (*L. S. & M. S. Rw. Co.* v. *People*, 46 Mich. 193, 211; *County of Redwood* v. *Winona &c. Land Co.*, 40 Minn. 512, 522.) This is not a suit brought by a property holder to restrain the collection of taxes, in which case it would be incumbent upon him to pay, or tender, the amount conceded to be due, but one in which the authorities are the moving party seeking to collect taxes, and in which the liability *in toto* is denied, and the property subject to taxation not fully identified or the amount of taxes determined until the final judgment.

Viewing the proceedings from an equitable standpoint, we see no error in refusing interest prior to the decree. The decree of the Supreme Court of New Mexico is affirmed, each party to pay the costs of its appeal to this court.

True copy.

Test:

Clerk Supreme Court, U. S.